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THE PARADOXICAL NATURE OF FEDERAL SECURITIES REGULATIONS

BY RICHARD MORTON*
AND
FRANK E. BOOKER**

Professor Morton and Professor Booker point out several inconsistencies which exist between the intended purposes of the Federal Securities Acts and their actual effect. Originally the Acts were meant to stimulate financing of American business by restoring the investor confidence lost during the Great Depression of the 1930's. The Acts require the issuer to disclose information concerning his reliability and his business purpose as the means of protecting the small investor. Ironically, this attempt to increase the flow of capital has actually hindered investment because trading in securities is viewed by the SEC as speculation which must be curbed rather than recognized as the primary purpose of the Acts. The authors argue that buying and selling securities should be recognized for what it is — speculation — and encouraged because it channels risk capital into business development. They show that the data which the Acts require to be disclosed obscures more than it informs. They argue that effective small investor protection means the SEC should give up its disavowal of any evaluation of the worth of securities and make a complete critique available to the public. The authors close by suggesting that recognition of these paradoxes will help the present regulation of securities marketing evolve into a more realistic and effective system.

AS A TOOL a screwdriver, as its name indicates, is designed to do one job — drive screws. It may be used for other tasks with varying degrees of effectiveness. It can open cans, stir paint, chip ice, chisel and even cut wood. But it does those tasks secondarily and not as well as it does the task for which it was designed. It is designed and made to drive screws. The Federal Securities Acts[1] as

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[1] The Securities Act of 1933, 48 Stat. 74, *as amended,* 15 U.S.C. §§ 77a-aa (1964) [hereinafter referred to as the 1933 Act]; and the Securities Exchange Act of 1934, 48 Stat. 881, *as amended,* 15 U.S.C. §§ 78a-jj (1964) [hereinafter referred to as the 1934 Act]. [Where the two acts are referred to as a legislative plan or scheme the reference will be to the Acts.]

a legislative plan are designed (according to the Securities and Exchange Commission) to elicit the "truth in securities." In fact the early descriptions of the law in legal writings and even in reported cases called the law the "truth in securities" law. Loss refers to the underlying philosophy of the two acts as the "disclosure philosophy"[2] and cites President Roosevelt's message to Congress in 1933 as his authority.[3] Like the screwdriver, the Federal Securities laws can do other things besides make issuers and dealers disgorge the truth. They can regulate the markets, provide investor protections, stabilize prices, control the people who deal in securities, and even determine the terms upon which securities can be sold, but the thing they should do best is elicit the material facts.

Many authors think and write in terms of the Federal Securities Acts as being products of the Great Depression, which hit its low point between 1932 and 1934.[4] However, this is not quite accurate. The problem of the Depression in 1933 was not that investors were being defrauded by misleading information and that a federal law to protect them was necessary. The problem of the Depression was that people with money had lost confidence in the securities markets because of the stock market crash of 1929. It was to regain this confidence that the Securities Acts were created.

There had been cries of need for federal regulation of corpora-

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[2] 1 L. LOSS, SECURITIES REGULATION 127 (1961).

[3] I recommend to the Congress legislation for federal supervision of traffic in investment securities in interstate commerce.

In spite of many State statutes the public in the past has sustained severe losses through practices neither ethical nor honest on the part of many persons and corporations selling securities.

Of course, the federal government cannot and should not take any action which might be construed as approving or guaranteeing that newly issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit.

There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.

President Roosevelt's message to Congress, Mar. 29, 1933, H.R. REP. No. 85, 73d Cong., 1st Sess. 1-2 (1933).

[4] From 1920 to 1933 some $50 billion of securities were sold in the United States. By 1933 half were worthless. In 1934 the American public also held over $8 billion of foreign securities, of which $6 billion had been sold in the years 1923 to 1930. By March 1934, $3 billion were in default. The aggregate value of all stocks listed on the New York Stock Exchange on September 1, 1929, was $89 billion. In the break of September and October they fell by $18 billion. In 1932 the *aggregate* figure was down to $15 billion — a loss of $74 billion in two and one-half years. The bond losses increased the total drop in values to $93 billion. Whether any legislation could prevent another such catastrophe is beside the point; it is a simple fact that the developments of 1929-1932 brought the long movement for federal securities regulation to a head.

1 L. LOSS, SECURITIES REGULATION 120 (1961).

tions and corporate finance for many years prior to 1929.[5] However, during this period most states had blue sky laws[6] already on the books,[7] and the preference for state regulation was stronger. But far more important, the pre-1929 market was a rising market where all the losses suffered by investors were made up in the next wave of buying, and consequently not enough people were hurt to make the problem one of pressing public necessity. When the market crashed in 1929, the number of people who held equity or debt securities had risen to the point where the markets were no longer the exclusive stomping grounds of the robber barons of the 1870's nor those crafty traders who made money both on the rise and fall of the market.[8] The general public had entered the market in sufficient numbers to be an effective moving force on the politicians. Nevertheless, this was not the dominant factor in bringing about the Securities Acts. If it had been, then the Acts would have been written and promoted by political hacks instead of college professors, prominent

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5 With almost every session of Congress, to say nothing of the forty-eight state legislatures, the topic of security frauds blithely recurs. No complaint can at least be made upon the quantity of current legislation on the subject. Measured merely by their length, bulk and number, America has enough security laws to last for another century at least. Meanwhile security swindling goes on, even in the states where the distribution of securities is most drastically regulated by statute.

Meeker, *Preventive v. Punitive Security Laws,* 26 COLUM. L. REV. 318 (1926).

During the period from 1900 to the advent of World War I, every President recommended to the Congress that legislation be enacted which would give the federal government control over corporations engaged in interstate commerce. The more far reaching of these proposals contemplated that corporations engaged in interstate commerce would be required to be federally chartered. No regulatory legislation was enacted, however, until the national emergency created by World War I when, in order to direct the flow of capital into channels which would best support the war effort, a Capital Issues Committee was established.

The necessity for this Committee disappeared at the end of World War I, and it was abolished. When it was dissolved it filed a report which recommended that, "federal supervision of security issues, here undertaken for the first time, should be continued by some public agency . . . in such form as to check the traffic in doubtful securities while imposing no undue restrictions upon the financing of legitimate industry."

Gadsby, *Historical Development of the S.E.C. — The Government View,* 28 GEO. WASH. L. REV. 6-7 (1959).

6 "They are called 'Blue-Sky Laws' because they stop the sale of stock that represents nothing but blue sky — nothing terrestrial or tangible." Cook, *"Watered Stock" — Commissions — "Blue Sky Laws" — Stock Without Par Value,* 19 MICH. L. REV. 583, 590 (1921).

A definition of "Blue Sky Law" is necessary. The State of Kansas, most wonderfully prolific and rich in farming products, has a large population of agriculturists not versed in ordinary business methods. The State was the hunting ground of promoters of fraudulent enterprises; in fact their frauds became so barefaced that it was stated that they would sell building lots in the blue sky in fee simple. Metonymically they became known as blue sky merchants, and the legislation intended to prevent their frauds was called Blue Sky Law.

Mulvey, *Blue Sky Law,* 36 CAN. L.T. 37 (1916).

7 "By 1933, every state but Nevada had some sort of blue sky law on the books." Cowett, *Federal-State Relationships in Securities Regulation,* 28 GEO. WASH. L. REV. 287, 289 (1959).

8 H.R. REP. No. 85, 73d Cong., 1st Sess. 2 (1933).

lawyers and statesmen.[9] The terms used to convince the Congress of the need for protection for the small investor were those picturing widows and orphans losing their life savings to goldbrick salesmen. In 1933, this specter was so common in the minds of the general public, that little more than slight reference was needed to conjure up an emotional picture of desperation caused by crooked securities salesmen.

While this emotionalism may have moved those subject to pulls of the heartstrings or the votes of the losing public, it was, objectively, so irrelevant to the actual problem that it could hardly have been the motivating force of the thoughtful and responsible proponents of the Acts. Their goal was to restore investor confidence in the securities markets because the source of funds for financing American business had dried up to a mere trickle. It was investor confidence they were after, not protection of helpless and defenseless people.

The late James M. Landis, who was Professor of Legislation at Harvard Law School in 1933, was asked by Felix Frankfurter, then a Harvard Law Professor also, to help write the 1933 Act for the congressional committee then working on it. Looking back over the years, Landis wrote,

> The act naturally had its beginnings in the high financing of the Twenties that was followed by the market crash of 1929. Even before the inauguration of Franklin D. Roosevelt as President of the United States, a spectacularly illuminating investigation of the nature of this financing was being undertaken by the Senate Banking and Currency Committee under the direction of its able counsel, Ferdinand D. Pecora. That Committee spread on the record more than the peccadillos of groups of men involved in the issuance and marketing of securities. It indicted a system as a whole that had failed miserably in imposing those essential fiduciary standards that should govern persons whose function it was to handle other people's money. Investment bankers, brokers and dealers, corporate directors, accountants, all found themselves the object of criticism so severe that the American public lost much of its faith in professions that had theretofore been regarded with a respect that had approached awe.[10]

The peccadillos of the Twenties seem little worse than the manipulations of the nineteenth century. It was not that the misdeeds of the market operators and corporate financiers were much worse than in previous periods, but simply that the crash of 1929 affected more than a small sector of the American economy. It infected the economy of the whole world. Business activity had receded to the point where the Government had to do something to get the

[9] Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959).

[10] *Id.* at 30.

engines of industry turning. The whole structure of our polity contorted itself, twisted, turned, writhed and wriggled, never to be the same again — just to get the nation's economy going again.

One of the major factors necessary for recovery was public confidence in the economic outlook and in the business prospects of the country. Many felt it would be revived if there were better protection than the ordinary common law protections for the investor, and if the Federal Government had the power to control, oversee and regulate the securities business.

While there were state controls on the law books at the time,[11] these state acts were never very effectively administered nor financed by the states and by their local nature could not have an overall national effect. What the country was seeking was a scheme, national in scope, that would be uniform in application.

At the time there were three general theories of securities regulations: (1) anti-fraud; (2) notification (registration); and (3) qualification.

The anti-fraud type of legislation prohibits fraudulent practices as criminal and gives the private citizen a right of action as well. Sales may be made without any required action on the part of the governing agency or the issuer. The acts operate retrospectively, coming into play after the issuer or a broker or dealer has done something that is prohibited, but the naked sale of the securities is never wrong.

Anti-fraud legislation is predicated upon the general criminal theory of deterrence and is as effective as the example of punishment can be. It is not open to argument that the deterrent effect of prospective punishment has never eliminated crime and never will regardless of the severity of the punishment. Almost all states have some anti-fraud provisions.[12]

The notification type of law depends upon disclosure as its effective force, and permits the issuer great freedom and latitude. Reduced to their bare essentials, such laws require the issuer to file a statement of who he is and what he intends to do. He may then issue and sell unless the governing agency takes prescribed steps to stop the issue. The notification theory does not include any evaluation of the worth of securities nor does it require the issuer to obtain a license. All it requires of the issuer is the filing of a statement; without it sales of securities are prohibited. Once a notification or

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[11] Cowett, *supra* note 7.

[12] "Thirty-nine other statutes — in every blue sky jurisdiction except California, Idaho, Maine, Montana, New Hampshire, North Carolina and Wyoming — contain assorted antifraud provisions. These provisions operate independently of the registration features." 1 L. Loss, Securities Regulation 42 (1961).

registration is filed and no action taken by the governing agency, there is nothing to prohibit the sale of the securities. This is the theory the Federal Securities Acts have followed, and it is the most common for the states' acts.

The qualification theory is the most stringent and restrictive. It prohibits the sale of securities without the permission of the governing agency. By requiring a license for the securities the agency is in a position to refuse to issue the license unless it considers the securities sound.

The Federal Securities Acts are nominally of the notification type and were originally predicated on that concept. President Roosevelt in his message to Congress recommending the legislation not only espoused the notification theory but specifically negated any idea of qualification when he said:

> Of course, the Federal Government cannot and should not take any action which might be construed as approving or guaranteeing that newly issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit.[13]

The notification theory depends upon disclosure as its effective force, both in supplying the information which is used to notify the authorities and the data upon which investors will rely and in having a deterrent effect upon possible fraud.[14]

Disclosure is the cornerstone of federal securities regulations.[15] The Acts were predicated upon and built around the idea of disclosure as the key to the proper balance between protection from fraud and freedom of investors to make legitimate business mistakes. Professor Loss says, "Congress did not take away from the citizen

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[13] H.R. REP. No. 85, *supra* note 3.

[14] "Publicity is justly commended as a remedy for social and industrial disease. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Stokes ed. 1914).

> When I came to the S.E.C. I thought the philosophy of disclosure had been fully depleted. Increasingly, however, I am convinced that in a pluralistic society — where as in business enterprise so many forces are operative — disclosure is the most realistic means of coping with the ever present problem of conflicts of interest. In some instances our conduct is motivated by what we think is right, without regard to anything else. But, perhaps, equally as important, ethical behavior (and wise counseling) often results from estimating the public's reaction to full knowledge of a planned course of conduct.
>
> The requirement of disclosure in certain instances — and its possibility always — is thus the most important regulatory force in our society.
>
> In other words, disclosure restrains because of sensitivity to public reaction, and caution about response to the dividend shareholder and the possibility of legal action. I firmly believe that disclosure does operate in this deterrent manner.

Cary, *The Case for Higher Corporation Standards,* 40 HARV. BUS. REV. 53, 54 (1962).

[15] J. HAZARD & M. CHRISTIE, THE INVESTMENT BUSINESS 298 (1964).

'his inalienable right to make a fool of himself!' It simply attempted to prevent others from making a fool of him."[16]

It should be fairly clear at this point that the real purpose in 1933 and 1934 in enacting the Federal Securities Acts was to stimulate the financing of American business and government by restoring the public confidence in the markets, and the tool by which the Acts were to do this was disclosure. The Acts have certainly accomplished their purpose; American business has been financed and in turn has supplied the capital for a substantial portion of the rest of the world. However, the idea of financing business has long since left the field as a goal and the concept of investor protection has entered to replace it. Then Chairman Cary of the Securities and Exchange Commission summarized the present philosophy of the Commission in a few well chosen words in his letter to Congress accompanying the SEC Special Study of 1963 where he said:

> The functions of this report and of any changes proposed are to strengthen the mechanisms facilitating the free flow of capital into the markets and to raise the standards of investor protection, thus preserving and enhancing the level of investor confidence.[17]

While Professor Cary gives lip service to the idea of "facilitating the free flow of capital into the markets," there is nothing in the SEC report to indicate that there is any concept of making it easier to obtain capital in the market place. All the recommendations in the report suggest ways to tighten up laxness and close up loopholes in the law which, of necessity and by design, make the task of obtaining money on the market that much more difficult. By removing from actual consideration the goal of facilitating the flow of capital, the goal of investor protection is left as the single main thrust of the Securities and Exchange Commission and of the Federal Securities Acts. Who, then, is an investor and does he need the protection of the SEC and all the laws? Is an investor any person who holds a security?

In general and with much overlapping there are four types of holders of securities. They are management, distributors, investors and speculators. The distinguishing feature between all these holders is the view with which they purchase or acquire the securities.

Management acquires its securities for control purposes and the return it can obtain through control. Sometimes management obtains debt securities for control purposes.[18] While profit is the motive,

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[16] 1 L. Loss, Securities Regulation 128 (1961).

[17] Letter of transmittal from William L. Cary, Chairman, Securities and Exchange Commission to President of the Senate and Speaker of the House of Representatives, Apr. 3, 1963, in Part I, Report of Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess. iv (1963).

[18] Management may use convertible securities for control purposes and the indebtedness of a business in difficulty is a powerful lever for control as well.

as it is the motive with other holders, management hopes to gain its profit primarily through salaries, dividends and interest. In addition management hopes to realize profits by its own efforts in increasing the value of the securities and consequently the sales price of the securities. It can hardly be asserted or believed that the federal or state securities acts were created or are maintained for the benefit or protection of management. A quick review of the Public Utility Holding Company Act of 1935,[19] a part of this general wave of reform, should put any doubts on this score to rest.

Distributors acquire their securities for the purpose of resale. While they do fall within some of the protections of the Acts, no one would have suggested in 1933 and 1934 that Congress should pass the Federal Securities Acts to protect underwriters and stock brokers.[20] It should be noted here that no distinction is drawn between holders of equity or debt securities. The view with which a distributor holds a security is not slanted towards value except as it affects resale price, and his interest is not to hold the securities for a return. At any rate the first two categories of holders of securities were not those parties for whom the Securities Acts were passed. It remains to be seen whether the last two parties were those for whom the Acts were passed.

There is a bit of confusion, perhaps because of overlapping of goals or because of an unclear picture of the security holding populace, in regard to the distinction between investors, speculators and gamblers. The term "gambler" is not made a separate category because the idea of speculation includes the concept of gambling. It would have been easy to set up a separate classification for the institutional investors such as insurance companies, trustees, banks, funds of all kinds, and it would have made sense to do this in 1933. But this is not 1933, and the situation is not quite the same; institutional investors buy speculative securities.

Again, it stretches credulity to suggest that the Securities Acts were passed to protect the institutional investors. Indeed, Landis

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[19] 49 Stat. 838, 15 U.S.C. §§ 79-79z-6 (1935). For a contemporary exposition of the government theory as to the evils at which the act was directed, see R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 247-60. *See also,* Electric Bond & Share Co. v. S.E.C., 303 U.S. 419 (1938), in which Jackson led, as Assistant Attorney General for the United States, and upheld the power of the government to impede very profitable management investment control techniques. With Jackson were, among others, Cohen and Corcoran, original drafters, with Landis, of the Securities Act of 1933. *See* Landis, *supra* note 9, at 35.

[20] "[The Securities and Exchange Commission] encountered both open and under-cover resistance from brokers, investment bankers, and money powers." R. JACKSON, *supra* note 19, at 147.

maintains that it specifically was not the purpose of the Acts.[21] So we must remove from that group of security holders for whose benefit the Acts were passed, the institutional investor, that knowledgeable buyer who acts upon his own knowledge, investigation and experience.[22] It does not matter whether he is investor, speculator, or a major financial house underwriting an issue or taking a position in a security for a quick profit.

The speculator could hardly be considered the legitimate beneficiary of the federal scheme of regulation. Tracy and MacChesney writing in 1934 said:

> On examination the complaints made are found to be reducible to two general heads: one, speculation; two, manipulation. Speculation is regarded as an evil because it is, in effect, mere gambling. Manipulation refers to dishonest practices of those who use the exchanges, whether they be brokers or traders. In discussing the evils charged against the exchanges and the proposed measures for their correction, it is well to bear in mind this important distinction.[23]

In highlighting this distinction they make it clear that gamblers and speculators are in the same class, and that they were not the intended beneficiaries of the Acts.

Reviewing the situation: The Federal Securities Acts were passed to protect certain holders of securities. Eliminated from the group of primary beneficiaries are the following classes: (1) management; (2) distributors; (3) institutional and large knowledgeable investors; and (4) speculators and gamblers. This leaves only the small private individual buyer of securities who is incapable of protecting himself. Apparently he was felt to be the most important factor in financing American business.

The words "investor," "speculator" and "gambler" are nice sounds and seem to convey a real meaning, but a closer look is required to see if they convey the same meaning today as they did thirty-five years ago and whether they refer to the same parties they referred to thirty-five years ago. While there are not a large number of cases that have made and considered the distinctions between these terms, a few of them are worthy of consideration here for what light they can shed upon the subject. In examining the distinction between investment and speculation in a case arising in Oregon the court said:

> There is an element of investment as well as an unavoidable element of speculation in every business in which property, whether tangible

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[21] "The sale of an issue of securities to insurance companies or to a limited group of experienced investors, was certainly not a matter of concern to the federal government." Landis, *supra* note 9, at 37.

[22] "[B]ureaucracy . . . could hardly equal these investors for sophistication." Landis, *supra* note 9, at 37.

[23] Tracy & MacChesney, *The Securities Exchange Act of 1934*, 32 MICH. L. REV. 1025, 1027 (1934).

> or intangible, is regularly bought and sold. The "in-and-out" market hanger-on who buys and sells through brokers on margin is a typical example of the pure speculator. . . . On the other hand, an investor is ordinarily thought to be a person who acquires property for the income it will yield rather than for the profit he hopes to obtain on a resale.[24]

Thus the distinction drawn in this and other cases[25] is that the investor is one who places money in such a way that the prospects are for little risk of loss and a steady return while the speculator is one who places money in such a way that there is a prospect of a large return regardless of the risk involved. To put it in more current stock market jargon, the investor is concerned with the downside risk while the speculator is concerned with the upside gain.

To gamble means "To stake money or any other thing of value upon an uncertain event."[26] Gambling is distinguished from speculating by the legitimacy of the source of the gain. This is well illustrated by a Georgia court which accepted this definition of speculation:

> "The act of speculating, by engaging in business out of the ordinary, or by dealing with a view of making profit from conjectural fluctuations in the price rather than from the earnings or the ordinary profit of trade, or by entering into a business venture involving unusual risks, for a chance of an unusually large gain or profit."[27]

Is the ordinary holder of securities for whom the Acts were designed an investor? Can it be said today that the ordinary holder of securities acquires his securities for a prospect of a steady return over the years? Does he acquire high grade corporate and government securities for a long pull interest return, or is the prudent small man concerned with preserving the buying power of his dollar in the face of an ever increasing inflation? Is the prudent small investor that man who uses the view of a fiduciary or a trustee in his investment goals? Or, on the contrary, is he a person concerned not with return and interest but rather appreciation of capital? If so, is the widow of today, placing the proceeds of her late husband's insurance policies in such a way as to preserve its real dollar value, a speculator hoping for a profit on resale?[28]

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[24] United States v. Chinook Inv., 136 F.2d 984, 985 (9th Cir. 1943).

[25] " 'Speculation' [is] . . . 'the act or practice of buying land, goods, shares, etc.,' in expectation of selling at a higher price.' " United States v. Kettenbach, 208 F. 209, 213 (9th Cir. 1913). " 'Invest' means . . . 'to lay out (money or capital) in business with the view of obtaining an income or profit; as to invest money in bank stock.' " " 'Speculate' — 'to buy or sell with the expectation of profiting by a rise or fall in price; often to engage in hazardous business transactions for the chance of unusually large profit.' " Clucas v. Bank of Montclair, 110 N.J.L. 394, 397, 166 A. 311, 313 (1933).

[26] State v. Berkman, 79 Ohio App. 432, 435, 74 N.E.2d 411, 413 (1944).

[27] Martin v. Citizens' Bank, 177 Ga. 871, 876, 171 S.E. 711, 714 (1933) (quoting *Webster's International Dictionary*).

[28] United States v. Chinook Inv., 136 F.2d 984 (9th Cir. 1943).

It is submitted that the meanings of these words have changed sufficiently and the nature of the national economy has changed sufficiently that the parties whom the Acts were primarily designed to protect are no longer people seeking to obtain a yield on a safe purchase but rather are people seeking a rise in value in order to hedge against inflation. This may have been defined as speculation at the time the Acts were passed, but it does not change anything more than the name of the parties who are and should be the primary beneficiaries of the Federal Securities Acts — the speculators!

As previously pointed out, there is an overlapping area between the meaning of speculation and gambling. If there be any who would argue that the Securities and Exchange Commission is concerned with investing and the flow of capital into the markets and not with supervising the biggest gambling operation in the world, he need not look any further than to the short sale.[29] The SEC certainly has the power to eliminate the short sale from the scheme of "investing" yet it retains it.[30] From the earliest history of the Securities Acts the short sale has been recognized as a gamble:

> There is no question but that a short sale is, in its essence, a gambling transaction, a gamble that the seller can later cover his sale at a lower price. It does not even bear the semblance of investment that is always present when the deal is a purchase of stocks.[31]

Yet, in the short sale the seller intends to deliver the shares he does not own because he borrows the shares and actually delivers them. Much law has been written prohibiting the sale of a commodity with no intent to deliver,[32] and the question of legality of the short sale was really put to rest only with the passage of the Commodity Exchange Act.[33] In a commodity futures transaction there is no in-

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[29] "[A] 'short sale' [takes place when the] seller has not the stock he assumes to sell, but borrows it and expects to replace it when the market value has declined." Such sales are perfectly valid, provided the parties contemplate an actual purchase or actual sale by or through the broker and not a mere settlement by a payment of differences. Hurd v. Taylor, 181 N.Y. 231, 73 N.E. 977 (1905).

[30] It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

48 Stat. 891, 15 U.S.C. § 78j (1964).

[31] Tracy & MacChesney, *supra* note 23, at 1028.

[32] *Legislation,* 45 HARV. L. REV. 912, 916 nn.25, 26 (1932).

[33] 42 Stat. 998 (1922), *as amended,* 49 Stat. 1491 (1936), *as amended,* 7 U.S.C. §§ 1-17a (1964); 68 Stat. 913 (1954), 69 Stat. 375 (1955), 7 U.S.C. § 2 (1964); 70 Stat. 630 (1956), 7 U.S.C. § 6a(3)(c)(1964); 69 Stat. 535 (1955), 7 U.S.C. § 12a(4)(1964).

tent to deliver,[34] and regardless of terminology it can hardly be maintained that it is not a gamble. At least when purchasing equity and debt securities the "long" buyer contemplates obtaining the bonds or shares and the consequent interest or dividends.

Gambling, as previously defined, has to do with the outcome of an uncertain event. Manipulation,[35] of course, is making that uncertain event certain. If one were to make the course of the market certain or predetermine the outcome of the market transactions, he would be subject to investigation for manipulation.

It was stated before that the small investor was the ostensible beneficiary of the Acts, not the larger investor who could take care of himself, yet the SEC permits trading in odd lots at a higher commission rate than trading in round lots.[36] If, in fact, the Commission were concerned with the small investor it would not permit this differential but rather would make it easier for the small investor to purchase at the same cost as the larger investor. At a time when some of the largest American corporations sell from $5,000 per one

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[34] "Thus trading in futures does not serve primarily to transfer possession of the contract subject matter; rather it involves mainly the assumption of the risk of price change by speculation, or the shifting of such risk by hedging." Note, *Federal Regulation of Commodity Futures Trading*, 60 YALE L.J. 822, 825 (1951).

> A futures transaction is a standardized contract made on or subject to the rules of a board of trade in which the seller or "short" agrees to sell and deliver a specified amount of a commodity in a certain month to the purchaser or "long" who agrees to accept and pay on delivery. Although the long can insist on taking and the short on making delivery — which is effected by the passage of warehouse receipts — upwards of 99% of all futures contracts are liquidated by purchases or sales of offsetting contracts in which equal long and short positions are cancelled against each other.

Comment, *Manipulation of Commodity Futures Prices — The Great Western Case*, 21 U. CHI. L. REV. 94-95 (1953).

> "In practice, however, actual delivery of the commodity seldom occurs; about 99% of the contracts are offset on the exchange by making an opposite futures transaction . . . ." Campbell, *Trading in Futures Under The Commodity Exchange Act*, 26 GEO. WASH. L. REV. 215, 217 (1958).

[35] Manipulation is the setting of security prices by artificial means and the circumvention of normal market action. It is prohibited by the Securities and Exchange Act of 1934, 48 Stat. 889, 15 U.S.C. § 78i and the rules promulgated under that act, 17 C.F.R. § 240, rule 10-b-1 and rule 10-b-5. Taken all together the prohibition is that not only brokers and dealers, but all persons who use the mails or the facilities of a national exchange may not effect any transaction or use any device or contrivance or circulate any false or misleading information for the purpose of setting prices. Specifically prohibited are wash sales, artificial market activity, matched orders, rumormongering, and making false and misleading statements. There are appropriate penalties including the private right of action to anyone who purchased at a manipulated price including the injured party's attorney's fees and costs. The language of the prohibition is broad enough to encompass "any device, scheme or artifice to defraud."

[36] On the NYSE [New York Stock Exchange], common stock shares are sold ordinarily in units of 100 called "round lots." Preferred stocks, and a few common, usually have units of 10 for a round lot sale. Any number less than a round lot, either 100 or ten, is called an "odd-lot" order. . . . Only round lots are completed on the NYSE. Odd-lot sales take place *technically* off the exchange, although . . . the odd-lot dealer uses the floor of the NYSE to get an effective round lot price on which to base his odd-lot transaction.

G. COOKE, THE STOCK MARKETS 73 (1964).

hundred shares[87] to $50,000 per one hundred shares[88] it seems to be contradictory to require a small man to put up large sums to be able to buy at the same price a rich man does. If the SEC were concerned with the small investor it would stimulate the odd-lot purchase rather than penalize the odd-lot as it now does. It is interesting to note that the odd-lot sales do not affect the prices on the New York Stock Exchange because the odd-lot sales are not reported except in total number of shares traded during the day and the odd-lot prices are pegged to the round lot prices.

People have a tendency to believe their own publicity, and the SEC, being composed exclusively of people, tends to believe its own publicity. If it begins to think that the fundamental and exclusive purpose of the Federal Securities Acts is to protect investors, it will not be long before the concept of "flow of capital" becomes a despised slogan of the opposition. So long as gambling is considered an undesirable social disease and only permitted by the state for the purposes of the state, a racing commission can have no other purpose than to preserve the confidence of the bettors that they are getting a fair shake and thus raise income for the community by keeping the game honest. The SEC should view itself in the same light, that is as an organization created to maintain the flow of capital to American business by means of protecting all the people who "invest" money in securities. This view of itself by the Commission would be a change from the present one which appears to be that the issuance, distribution, sale and trading of securities are merely permissible business activities allowed by the federal scheme of regulation and not the primary purpose of the Acts.

The foundational concept of securities regulation in the notification type of law is disclosure. The thought was that proper disclosure would effectuate the purposes of the Act, so long as the purposes of the Act are those of protecting the small investor. As a practical matter, most of the data disclosed by command of the Acts discloses nothing to the small investor and is not likely to disclose anything to the small investor. It is doubtful that it is possible to create a scheme which could possibly disclose either the whole truth or the material truth to the small investor. Very early in the life of Federal Securities Regulations, Justice William O. Douglas, then a Professor of Law at Yale wrote:

> Some, however, have believed, apparently in all sincerity, that the great drop in security values in the last five years was the result of

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[37] The current (July 10, 1967) price of one share of American Telephone and Telegraph is approximately $51.00. (High 52⅞, Low 51⅛, Close 51⅝).

[38] The current (July 10, 1967) price of International Business Machines is approximately $502.00. (High 507, Low 502, Close 503½).

> failure to tell the "truth about securities." And others have thought that with the Securities Act it would be possible to prevent a recurrence of the scandals which have brought many financiers into disrepute in recent years. As a matter of fact there are but few of the transactions investigated by the Senate Committee on Banking and Currency which the Securities Act would have controlled. There is nothing in the Act which would control the speculative craze of the American public, or which would eliminate wholly unsound capital structures. . . .
>
> But even the whole truth cannot be told in such simple and direct terms as to make investors discriminating.[39]

While many kinds of information are required to be disclosed there is but one major requirement intended to go directly to the ultimate investor, and that is the prospectus. It arrives for some strange reason just *after* the investor has made a purchase.[40]

The Securities Act of 1933 requires that a vast amount of information be accumulated and filed with the SEC as part of the registration statement. This information is boiled down to a few dozen pages in an honest and legitimate attempt to present a full and true summary to a prospective investor. The prospectus is then forwarded to the purchaser of the securities, not before he makes the purchase, but after — much as a memento of the sale.[41] How can we expect the average investor with little sophistication to intelligently use it as an aid in making an investment decision?[42] Further, if the prospectus is a device intended to disclose information to prospective investors, why are the only investors who get a prospectus *before* purchase those who are least likely to need it — namely,

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[39] Douglas and Bates, *The Federal Securities Act of 1933,* 43 YALE L.J. 171 (1933).

[40] In particular, while the prospectus must be the first written communication (other than a "tombstone" ad or an authorized summary prospectus) in connection with a public offering, the law does not require that it be delivered before orders for the registered security may be solicited, received, or even accepted, but only that its delivery precede or accompany delivery of the security to the customer "after" sale. Even if the customer is not legally committed to his purchase at (or before) the moment of delivery of the security to him, he is surely "committed" in the sense of having made his investment decision well before this moment; yet this may be (and usually is) his first opportunity to see the prospectus. At this point he can hardly be said to have derived benefit from the affirmative aspect of the prospectus delivery requirement, but only from the negative aspect of having been shielded from any prior written communication not qualifying as a prospectus.

Cohen, *"Truth in Securities" Revisited,* 79 HARV. L. REV. 1340, 1350 (1966).

[41] Lobell, *Revision of the Securities Act,* 48 COLUM. L. REV. 313, 323 (1948).

[42] While personal experiences are not favored in law review articles, yet one of the authors feels constrained to point out that after a Bachelor's Degree in Business Administration, 11 years experience in corporate enterprise including publicly held corporations, a Bachelor of Laws degree, a Master of Laws degree, 15 years dealing in securities, and three consecutive years of teaching Securities Regulations, he is still unable to effectively use a prospectus as a tool for making an investment decision.

existing stockholders who receive a rights offering or an offer of an exchange?[43]

The financial statements prepared by independent accountants included in the prospectus are the usual kind of financial statements used in businesses all over the world, such as balance sheets and profit and loss statements. However, most publicly held corporations' affairs and business transactions are extremely complicated. To make statements reflect a true picture, they must be explained further. These explanations are located in the footnotes to the financial statements. The footnotes, printed in the smallest possible type, often are longer than the financial statements. Assuming the issuer has no intent to hide or confuse, the command of the law that the statements are not to be materially misleading or false necessarily makes them materially obscure, even to the initiated.

The paradox of disclosure is that every added disclosure tends to obscure rather than inform. It suggests that perhaps there is a point of diminishing return, a point beyond which we begin to defeat our fundamental purpose. Perhaps the required notices that must be placed in large type on the face of a prospectus are as good an example as any. If there were one warning, of any color type, it might be read, but the front cover of a prospectus is covered with warnings so numerous and profuse that no one takes time to read them. The prospectus has become a formalistic legal document. As a bill of lading is not a meeting of minds, the prospectus is not an inducement to buy.

There are generally two kinds of information which the 1933 Act requires to be disclosed. The first we have discussed — that intended to be disclosed directly to the customer. The second kind is the information intended to be disclosed to the SEC. This last part makes up the vast bulk of disclosures required including not only the registration statement but the periodic reports needed to keep that data current. While this information is nominally open and available to the public, the public never actually sees it. A newspaper article described the manner in which the SEC makes this data available. "[T]he focal point for much of the essential transfer of

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[43] Curiously, the prospectus delivery requirement operates at highest efficiency — in the sense that the required prospectus is certain to be delivered to all offerees in advance of their investment decisions rather than at the completion of their purchases — in certain situations where a full-blown prospectus is probably least needed: a rights offering or an offer of exchange to existing stockholders. In both cases the very nature of the transaction ordinarily compels written communication of details of the offer, and therefore a full prospectus, at an early stage. Yet by hypothesis the offerees are already stockholders and thus presumably have some familarity with the company and perhaps with the class of stock being offered, so that "new" items of information would be relatively few.

Cohen, *supra* note 40, at 1351.

financial data to securities buyers is a cramped reference room in SEC headquarters here that, by actual count, provides just twenty chairs for America's seventeen million investors. What's more, only rarely is there great demand for the seats."[44] Even if an interested person did want some information, a great deal of pertinent data is filed in a warehouse across the river at Franconia, Virginia, and is not readily available. Further, if some small investor wanted to copy some of the disclosures, the article reported it would cost fourteen cents per page. Disclosure to the SEC is not, in fact, disclosure to the general public.

If there ever was a situation where the SEC forced a company into disclosing the truth it was surely the *Tucker* case.[45] Preston Tucker created a new enterprise to manufacture automobiles just after World War II. He raised about $26,000,000 from the public *after* disclosing that the automobile to be produced had not been tested, that there were probably patents needed, that Tucker had transferred corporate funds to his personal account, and had made no net cash contribution to the company but instead had already drained nearly a quarter of a million dollars of its capital to himself *prior* to approval of the registration, that there was pending litigation, that Tucker had as an associate with him in the venture a man with a criminal record and an attempt had been made to cover up this fact, that Tucker had previously violated the Securities Act in this very venture, and other facts too numerous and detailed to enter here. Yet, regardless of the facts so stated, Tucker was able to raise $26,000,000 and ultimately topple into bankruptcy.[46]

No matter what truth is disclosed, you can lead an investor to a prospectus, but you can't make him read it.[47] Moreover, if he is a gambler rather than an old fashioned investor, even if he could understand it, it would not be relevant.

If we accept the ideas introduced earlier that the protections are needed by the small man only, and that he is for the most part a speculator, then effective small investor protection requires one of two things: either the complete evaluation of securities by a competent authority so that he will at least get his money's worth or

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[44] Kohlmeier, *Informing Investors,* The Wall Street Journal, Apr. 17, 1963, at 16, col. 4.

[45] *In re* Tucker Corp., 26 S.E.C. 249 (1947).

[46] One may obtain a view of these proceedings by reading *In re* Tucker Corp., 256 F.2d 808 (7th Cir. 1958). Compare particularly the view argued successfully for the debtor in the Seventh Circuit as to the management's honest belief in the adequacy of its working capital for the task in hand (256 F.2d 811) with the grim and specific warnings by the SEC *prior to registration approval,* on the same subject, *In re* Tucker Corp., 26 S.E.C. 249, 260-61 (1947). Notice also the warning by the SEC as to the dangers to purchasers of franchises, which the Seventh Circuit case eleven years later proved to have been painfully accurate. *Id.* at 252-53.

[47] Old Wall Street Proverb.

conversely adequate supervision of the game so that he can get a fair deal. If the fundamental purposes of the securities laws are in terms of investing, then the SEC should evaluate the securities as to worth. If the fundamentals are in terms of speculation and gambling, then the SEC should supervise the legitimacy of the game.

In view of the fact that to admit to the concept of the legitimacy of speculation and gambling would be against a well formulated public policy, the question of the validity of its converse is raised. Should the system of federal securities regulation evaluate the worth of individual securities?

The law does not forbid it, but the examination of the worth of securities was not a part of the plan nor is it supposed to be a part of the plan. It is hard to envision an employee of the SEC whose job it is to examine the registration excluding any personal evaluation of the worth of the securities offered for sale. Beyond that, though, one author recently has written:

> One of the outstanding accomplishments of the S.E.C. since its creation has been the "processing" of registration statements, a phenomenon of great importance that, curiously, is not even adverted to in the statute. In the interval between filing and effectiveness of a registration statement — an interval apparently designed to allow for circulation and absorption of filed information and for the Commission's use of its refusal order or stop order powers — an examination of great thoroughness is made by staff members, and their views are expressed to the registrant in a letter of comments (popularly known as a "deficiency letter") which forms the basis for the finally amended document.[48]

This process is at least a partial evaluation of the worth of the securities. One of the more interesting cases to arise in this connection involved the Hydramotive Corporation which claimed it filed a registration statement and that the SEC refused to take it seriously and ignored it. Some of the material contained in the statement filed was listed in the reported case as follows:

> (1) The present directors do not foresee the possibility of the corporation ever being in a position to pay any dividends or having any assets of determinable value. The continued existence of the corporation is questionable. Bankruptcy may result at any time.
>
> (2) Anyone considering purchase of this security must be prepared for immediate and total loss.
>
> (3) No representation is made that the possibility exists that the corporation can continue to exist.
>
> (4) No representation is made in this statement that the President and Secretary of the Company have any capability that can benefit the corporation in any way.
>
> (5) In view of the above unfavorable factors, and other unfavorable factors in every part of this offering circular, it would appear

[48] Cohen, *supra* note 40, at 1353.

> that it is self-evident that any prospective purchaser of Hydramotive Corporation stock should be prepared for an immediate total loss.

The District Court threw it out as "nothing more than a sarcastic piece of mockery."[49]

Even the *Tucker* case was in fact an evaluation of the worth of the securities involved. The paradox herein is that even while repeating over and over that it does not evaluate the worth of securities, the SEC does in fact do so. The SEC should be concerned to see that an investor cannot make an investment below a certain standard of return and can only buy securities of a certain investment quality.[50] "Compensation or reparation will never serve the same high purpose as prevention."[51]

The state of California does currently evaluate the worth of securities[52] and the idea that the federal system should evaluate the worth of securities is not a new idea. Justice William O. Douglas, in evaluating the idea of a federal system wrote in 1934:

> Any comprehensive and consistent control of the type which these parts of the New Deal envisage must inevitably embrace within it control over security issues. That in essence means control over access to the market. That control would be an administrative control lodged in the hands not only of the self-disciplined business groups but also in the hands of governmental agencies whose function would be to articulate the public interest with the profit motive. . . .
>
> In that type of control we should have something much more fundamental than the truth about securities.
>
> We should be searching for the elements of soundness and stability, the absence of which caused most of the things we so frequently attribute to fraud and deceit. At the same time, the requirement of the truth about securities would be retained. But it would be given the secondary and relatively unimportant place which it deserves.[53]

CONCLUSION

We have attempted here to set forth the rather paradoxical nature of the federal system of securities regulation and the idea that

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[49] Holmes v. Cary, 234 F. Supp. 23, 24 (N.D. Ga. 1964).

[50] Joslin, *Federal Securities Regulation from the Small Investors' Perspective*, 6 J. PUB. L. 219, 223 (1957).

[51] Douglas, *Protecting the Investor*, 23 YALE REV. 521, 524 (1934).

[52] If the commissioner finds that the proposed plan of business of the applicant and the proposed issuance of securities are fair, just, and equitable, that the applicant intends to transact its business fairly and honestly, and that the securities that it proposes to issue and the method to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof, the commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, in this State, in such amounts and for such considerations and upon such terms and conditions as the commissioner may provide in the permit. Otherwise, he shall deny the application and refuse the permit, and notify the applicant in writing of his decision.

CAL. CORP. CODE § 25507 (West 1955).

[53] Douglas, *supra* note 51, at 531-53.

the resolution of the paradoxes would bring forth a system with less inconsistencies and a more logical approach to the concept of American capitalism.

The four basic paradoxes we have attempted to set forth are these:

1. The Federal Securities Acts were designed to stimulate the flow of capital into business by means of increasing investor protections, but each added protection is an added stumbling block to the flow of capital.

2. Gambling is illegal in most places and strongly against public policy, yet today the system of buying and selling securities maintained for the purpose of channeling risk capital into business is not really investing but gambling.

3. The concept of disclosure, designed to elicit the truth in securities, has become so formalistic as to conceal and obscure rather than disclose.

4. The theory upon which the federal system is predicated is to protect small investors by means of disclosure, but the only real protection small investors get is through an evaluation by the SEC of the soundness and worth of securities.[54]

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[54] The practical effects of this paradox are well illustrated by the Tucker automobile case, discussed *supra* notes 45, 46. The picture presented is that of a shepherd attempting, at night, to protect his flock against a tiger — with a flashlight. To the inevitable slaughter, the light of disclosure added only the additional horror of perfect awareness of what was happening and would happen. The sheep were not warned, and the hungry tiger was not deterred. The genuine and well-founded distress of the shepherd is clearly preserved in the opinion of the SEC. Notice these excerpts:

> Under the Securities Act of 1933, this Commission does not approve or pass on the merit or lack of merit of any security offered. It is specifically made a criminal offense under the Act for any person to represent the contrary. The Commission's primary function is to require full and adequate disclosure of all material facts in connection with a public offering of securities so that investors may, on the basis of such disclosure, arrive at an informed judgment as to whether or not to purchase the securities offered. [26 S.E.C. 249.]
>
> Since January 1946, there has been extensive publicity concerning the Tucker organization and its plans to manufacture a modern automobile. In many periodicals, newspapers, sales brochures and company advertisements, which are part of the record before us, there has been widespread comment as to the radical features the Tucker car possesses, elaborate and conflicting claims as to its expected accomplishments and performance, and exaggerated statements as to the funds invested by the management. Many of the statements that have been publicized in the past appear to be grossly misleading and, in many cases, false. We cannot ignore the impact of the misleading information contained in past publicity concerning the corporation and its officials on the minds of the investing public. Floyd D. Cerf, president of the underwriter, testified he had no doubt the present issue could be sold merely on the basis of the widespread public interest that had already been created.
>
> The contrast between the information contained in previous publicity and that contained in the prospectus, as it has now been amended, is so pronounced that we deem it necessary to warn the investing public of the danger of relying on any past judgment based on prior literature in determining whether to purchase the securities of the registrant. We urge that

prospective investors make a careful study of the amended prospectus. [26 S.E.C. 250-51.]

Preston Tucker has had complete control of the corporation from its inception. The manner in which the funds of the corporation have been administered in certain instances raises some grave questions as to whether a proper stewardship of corporate funds has been consistently maintained. [26 S.E.C. 253.]

The registration statement, as originally filed, contained no intimation that further financing might be necessary. This point was considered at length in the 8(e) examination and in the 8(d) hearing. The amended prospectus now admits (1) that circumstances may arise which may require substantial additional funds for working capital purposes, (2) that no plans have been formulated for the securing of any such additional funds, nor does the corporation have any assurance of being able to obtain them when and if they are needed, (3) that if such additional funds become necessary and are obtained, they may occupy a position senior to that of the Class A common stock offered under the present registration statement, and (4) that failure to obtain additional funds, if needed, may result in substantial loss to purchasers of Class A stock. [26 S.E.C. 260-61.]

Since these amendments appear to have corrected the misstatements and omissions . . . we have determined to dismiss the stop order proceedings and permit the registration statement, as amended, to become effective. . . . In taking this action, we emphasize again that we are in no way passing on the merit or lack of merit of the securities offered, the registrant's product, or the possibility of success or failure of the enterprise. These are decisions which each investor must make for himself. The limits of the Act and the Commission's job under it are to require that information be supplied which will enable the investor to arrive at an informed judgment. Investors will be supplied with the amended prospectus and we can only urge again that their decision on whether or not to purchase the securities offered be based on a careful study of the information contained therein. [26 S.E.C. 263-64.]

The flashlight had certainly been used with diligence, energy, integrity and courage, but perhaps a flashlight is not an adequate weapon with which to protect sheep against tigers.

THE LAW OF DEMONSTRATIONS: THE DEMONSTRATORS, THE POLICE, THE COURTS

BY KERMIT LIPEZ*

ON JULY 4, 1966, George Ball came to Independence Hall in Philadelphia to deliver the principal address at an Independence Day rally. His topic was not announced in advance, but, inevitably, he would speak of Viet Nam. George Ball was from the State Department, and the State Department had us in that war. The Philadelphia Police Department knew that his visit would be controversial. The peace movement was active in Philadelphia, and the Department's Civil Disobedience Unit had already been warned by the Department of Interior, which controls the national shrine, that there might be trouble. The Unit had also received a letter from Mr. Eric Weinberger, National Secretary of the Committee for Non-Violent Action, informing it that his group would demonstrate at the time of Ball's visit. Several days prior to the demonstration Mr. Weinberger visited Police Headquarters.

The story now begins to blur. Mr. Weinberger gives one version of that visit, the police another. They insist that Mr. Weinberger, after informing them that there would be about 1,000 demonstrators, all of whom he represented, agreed that his demonstration should be confined, at all times, behind barricades on the north side of Chestnut Street, across from Independence Hall. Mr. Weinberger concedes the agreement, but he claims the police told him he could send leafleteers to the south side of Chestnut. At the subsequent trial of the demonstrators on disorderly conduct charges, the court, confronted with this conflicting testimony, accepted the story of the police. We, too, will accept that story, simply because it makes this case analytically more provocative.

After the meeting with Weinberger, Inspector Meers, the chief of the Civil Disobedience Unit, Lieutenant Fencl, his principal assistant, and Chief Inspector Selfridge of the Traffic Division, held their own meeting to map strategy for control of the July 4th demonstration. They decided to place one hundred uniformed policemen on the scene, along with fifteen men from the Civil Disobedience Unit, dressed in plain clothes, who would coordinate the control efforts. Detectives would be placed inside the Independence Hall enclosure,

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the site of the day's formal ceremonies. The officers also decided on the deployment of barricades, and the issuance of intelligence information on the Committee for Non-Violent Action to the members of the Civil Disobedience Unit. All these decisions were premised on the information supplied by Mr. Weinberger and, more fundamentally, on the agreement to keep the demonstration behind the barricades. However, the police also had to consider the likelihood that other groups, antagonistic to the anti-war demonstrators, would counter-protest. Legionnaires had already called Inspector Meers, threatening to do just that. The Inspector had told them to stay away, but he suspected they would come. Finally, the officers had to plan for the presence of a group of homosexuals, protesting the refusal of the Armed Forces to allow them to serve.

On the morning of July 4th the police arrived at Independence Hall around 9:00 and proceeded to set up their barricades. The demonstration was to begin at 10:00, the formal ceremonies at 11:30. At about 9:30 twenty-five members of the anti-war group arrived. They immediately went behind the barricades on the north side of Chestnut Street, held up their signs, and began to march around. Gradually their numbers swelled. At 10:00 three busloads of demonstrators arrived from New England. The police directed the buses to Fifth Street, where they had provided for parking, and they then escorted the demonstrators back to the north side of Chestnut Street, behind the barricades. Twice, at the request of demonstration leaders, these barricades were extended along Chestnut Street to accommodate the growing crowd. But at 10:15 some of these leaders approached Inspector Meers and Lt. Fencl, requesting permission to distribute leaflets on the south side of Chestnut Street in front of Independence Hall. They apparently also wanted to carry some signs, but this fact is unclear. Again the police insist that this request was made, the demonstrators deny it. Whatever the truth, the officers, fearful of a confrontation with hostile groups now congregated on the south side of Chestnut Street, denied the permission. There were, at this time, several hundred people inside the Independence Hall enclosure, waiting for the formal ceremonies to begin, and about three hundred people on the sidewalk outside the enclosure, including members of the American Legion and the Veterans of Foreign Wars. The demonstration leaders, thus balked, returned to the south side of Chestnut Street, where they conferred with Eric Weinberger, who still controlled the demonstration. Some of the leaders wanted to move the whole demonstration across the street, but Weinberger strenuously resisted this suggestion. He indicated,

however, that if individuals wanted to distribute leaflets, they should do so.[1]

Soon thereafter, Robert Brand, a leader of Students for a Democratic Society, came back across the street, stood in front of Independence Hall, and started to distribute leaflets. Several other demonstrators followed Brand, some with signs, all with leaflets. Inspector Meers described this tactic as platooning, suggesting that the demonstrators would move across the street in small groups until the entire demonstration had been transferred to the south side of the street. He and Lt. Fencl were convinced that this was the ultimate intent, and they felt the result would be intolerable. The officers approached Brand, who had now been distributing leaflets for a short time, and those other demonstrators who had crossed the street. They reminded them of the agreement with Weinberger, and asked them to move back across the street. The demonstrators all replied that they had a right to be where they were; some said they knew of no agreement.

Precisely what happened next is unclear. Apparently there were now about ten demonstrators on the south side of Chestnut Street, leaving about five hundred demonstrators behind the barricades across the street. Lt. Fencl insists that the demonstrators standing before Independence Hall were now surrounded by hostile groups that called them names and made threatening moves. Fearing violence, the police again asked the demonstrators, and those surrounding them, to move off. They warned the demonstrators that their refusal would mean arrest. The hostile crowds dispersed, but the demonstrators remained, later denying that they had met any hostility. Brand, warned of arrest, sat down on the sidewalk, and was promptly arrested. More platoons of demonstrators, seeing the arrest, now crossed the street. Some of these, along with some of the original ten, also sat down and were arrested. Others who did not sit, but who continued to distribute leaflets, were also arrested. Later, at trial, the distinction between those who sat down and those who simply continued to distribute leaflets will become important. All, however, were charged with disorderly conduct and convicted at a summary hearing before the Magistrate.

I.

This demonstration was not unique. Throughout the country, ever since the Civil Rights Movement gained momentum, there have been thousands of similar protests, challenging government abuses on all levels. But the value of this demonstration, for analytic pur-

[1] Mr. Weinberger was interviewed on Mar. 9, 1967. He provided this information, as well as observations on the demonstrations that are discussed later.

poses, rests in its very typicality.[2] Hundreds of people have gathered in a public open space to protest about a "public issue."[3] Bulk, the size of the gathering, is a crucial element of that protest, capturing the attention of a passing public. Without size and organization, the protest might disintegrate into isolated, unnoticed gestures. It is not enough, however, merely to capture attention. Once captured, that attention must be informed. Thus the demonstrators explain their grievances with signs and leaflets, insuring that the demonstration does not become a meaningless display.

Place, the site of the demonstration, also contributes to its meaning. The demonstrators, by standing across the street from George Ball, subjected his speech, no matter how bland, to continuing criticism. Remove them to a distant park, or any neutral setting, and their protest would seem vainly abstract. Similarly, the demonstration gained impact from the nearness of Independence Hall. As the literal birthplace of our nation, the shrine has become, over the years, a potent symbol. Like any symbol, it can be weighted with many meanings. But to the demonstrators it suggested a purity of purpose now betrayed by a corrupt government. They emphasized that betrayal in the leaflet, *A Birthday Message to America and Americans,* which they distributed. The charge was blunt:

> The United States is in Viet Nam because we have forgotten the meaning of the Fourth of July. We have made Viet Nam a kind of colony of our own, and we have over a quarter of a million troops there today. And like the British in 1776, what we don't understand today is that most of the Vietnamese, both South and North, don't want us there. They want to be free, to live in peace, to set up their own government, organize their own society, make their own mistakes. They want our bases and Navy out, and our troops to go home.

To these demonstrators, given this conviction, the presence of George Ball at Independence Hall on July 4th was cruelly ironic. Their demonstration illuminated that irony.

No single motive, however, can be assigned to these demonstrators. Some were there simply to dissent, to declare, out of inner necessity, their profound hostility to their government's actions. Caring little for the enlightenment of their fellows, they sought only to stand publicly apart from their folly. Others, viewing the demonstration as a graphic form of communication, hoped to enlighten. Perhaps by boldly challenging the easy truths of the conventional media, they could force some doubt. Perhaps they could confront George Ball and those after him with a more critical audience.

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[2] This typicality does not extend to the police efforts at control, which are unusual, and valuable, analytically, for their uniqueness.

[3] Kalven, *The Concept of the Public Forum,* 1965 SUP. CT. REV. 1. Kalven states that Cox v. Louisiana, 379 U.S. 536 (1965), and cases like it, involve "public issue" picketing. They are distinguished from the labor picketing cases because there is no picket line, no specific target, and usually no evoking of economic pressures.

Still others, more aggressive or angry, hoped to stir more than doubt. This element is elusive. It is tempting to say that some demonstrators wanted trouble, conflict, the central element in direct action. But direct action, as the following explanation suggests, seems inappropriate for the setting of July 4th:

> The emphasis of the direct action groups is to place pressure upon the power structure by means of positive social dislocation, that is, by economic, political, and moral leverage. Direct action groups do engage in negotiation, but their efforts are less an attempt to get an agreement within the power structure as to how to deal with the situation, and more toward confronting the whole power structure with a conflict situation with which it must somehow come to terms.[4]

This technique contemplates a local power structure, threatened with paralysis by the obstructive actions of the militant. The national government cannot be so threatened. But, even when the protest looks to Washington, the local authorities must deal with its local manifestation. Official sensitivity, though not directly challenged, can still be exploited:

> Demonstrations are primarily expressions of a point of view, and do not of themselves change the power structure as vigorously as non-cooperation or direct intervention might. Nevertheless, they do go beyond verbal protest and are considered sufficiently threatening by many authorities to provoke harsh reprisals.[5]

If these harsh reprisals come, if conflicts with other groups and the police intensify, forcing impulsive arrests, then the demonstrators have further dramatized their cause, particularly if their own actions have been responsible. Publicity will be theirs. They will have exposed the vulnerability, governmental and private, of those who oppose them. Admittedly, the spectacle of conscious trouble-making is disturbing. The squeamish will cry anarchy. But there is a nexus between the effort to persuade and the trouble-making that must not be overlooked. Persuasion often requires a shock. People do not easily abandon comfortable assumptions. Thus the demonstrators must arouse their immediate public if they are to have an impact. The concern for a too perfect order, free of all conflict, might reduce demonstrations to futile exercises. There are problems here, of course. The demonstrators must remain responsible. The conflict they force must be in response to their positions, and not simply to provocative conduct. But it would be tragically naive to believe that demonstrations are legitimate only so long as they resemble calm efforts at persuasion. They are potentially, by their very nature, far more volatile than that, and any theory of their legitimacy must reckon with that fact.

However, Eric Weinberger, who organized the July 4th demon-

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[4] M. OPPENHEIMER & G. LAKEY, A MANUAL FOR DIRECT ACTION 31 (rev. 1965).

[5] *Id.* at 73.

stration, insists that his group, the Commitee for Non-Violent Action, less militant than other peace groups present that day, does not usually seek trouble, either from the police or from hostile crowds. The press, when it covers violence at demonstrations, often focuses on the antics of thugs, ignoring the responsible conduct of most of the demonstrators or the object of their protest. Such coverage, he says, has little value. Also, if there is the prospect of trouble, members of his peace group, despite the strength of their commitment, will hesitate to come. Thus, in a pamphlet called *Discipline for Peace Demonstrations,* endorsed by numerous New York City peace organizations and distributed to their members, demonstrators are urged to shun unduly provocative conduct:

> A disorderly demonstration is more likely to arouse opposition than support. Violence on the part of the demonstrators will almost certainly retard, rather than advance, the work of the peace movement. Demonstrations can be an opportunity to communicate our friendliness and concern for others in and outside of the demonstration and to begin to express specifically the concept of altruistic love.

Similarly, the demonstrators are urged to cooperate with the police:

> In our contact with the police and other officials, we will:
>
> A. Maintain an attitude of understanding for the responsibilities with which they are charged.
> B. Be courteous at all times.
> C. Be completely open in announcing what we plan to do.
> D. Accept all requests which are reasonable.

This emphasis on order and cooperation, however, reflects no fear of harm or disorder. Weinberger insists that his people do not cooperate with the police because they want their protection. Though they know they will often face abuse, they cannot, as pacifists, ask to be protected by guns. They cooperate simply because the good will of the police, in their view, often enhances the value of their demonstrations. However, there will be times when the demonstrators, turning to civil disobedience, seek disorder and sacrifice good will. Weinberger speaks bluntly. He, and those in his organization, looking to the philosophy of Thoreau, feel no obligation to obey laws they regard as unjust. But Weinberger concedes that this philosophy is most apt when, for example, pacifists throw themselves in front of trucks carrying bombs that will fall in Viet Nam. There the tie between act and grievance is clear, dramatic. But the philosophy becomes strained when pacifists, bent on direct action, deliberately snarl traffic in Times Square to protest the war. There the tie becomes almost invisible. Burke Marshall, writing on "The Protest Movement and the Law," has noted this problem in the civil rights field:

> I know of no systemized analysis of the conditions under which individuals or groups might be justified in refusing to comply with

> laws that are unrelated to their grievances in order to focus public attention on the grievances and perhaps bring about a solution of them through political change.[6]

He adds, "It is one thing to protest segregation by breaking the rules that bring it about . . . . It is another to adapt the means and methods of direct action . . . to protest against what are complex and deep-rooted economic and social problems . . . ."[7] Weinberger recognizes Marshall's distinction, but he does not share his implied objection. If pacifists feel their society is functioning smoothly for evil, they must, on occasion, protest by symbolically withdrawing from that smooth functioning. Hopefully, the specific object of such protest will remain visible. Weinberger does not argue that such protest should be sanctioned by law. He simply feels that it is philosophically defensible. On July 4th, however, civil disobedience, direct or symbolic, would not, Weinberger emphasized, have furthered the aims of his organization. Ball's presence made symbolic gestures unnecessary, and, since the aim was to stage a large demonstration, plans for civil disobedience would have kept too many pacifists away. Going to jail is just no fun.

The police, however, despite the absence of civil disobedience, still faced a complex situation, demanding the accommodation of many interests. On one level, there were the interests of several groups that sought to demonstrate at the same site: the anti-war people, the homosexuals (though they never came), and the pro-war people (some of whom arrived in organized groups). Their competing efforts all deserved a hearing. Without the police to mediate, these efforts might have been wasted in conflict. On another level, there were the interests of those who cared nothing for demonstrations, but who simply wanted to walk freely into Independence Square, or drive, unharassed, along Chestnut Street. These were not unreasonable desires, and the police, sensitive to these prevailing uses of the streets, could not ignore them. Finally, implied by the above, but much more vague, looking to people not present, there is the broad interest of the community in a life free of public disorder. This interest requires no specific representative. It is a sacred assumption of our social existence. But the threat to this interest does appear in a specific form — the hostile crowds that surrounded the demonstrators when they crossed Chestnut Street. Unlike the pro-war demonstrators who came as an organized group to counter-protest, these hostile crowds, though their anger might be ideological, sought mainly to harass and provoke the demonstrators. Yet this characterization, perhaps overstated, does not inevitably imply

[6] Marshall, *The Protest Movement and the Law,* 51 VA. L. REV. 785, 799 (1965).

[7] *Id.* at 801.

that these crowds, rather than the demonstrators, must assume responsibility for the threat to community order. Here, at Independence Hall, the police, moving to arrest, assigned that responsibility to the demonstrators.

These arrests are the troublesome fact, forcing, by their finality, by their control of the future, a speculative probe of the larger issues they imply. These arrests issued from a demonstration, protesting against the war in Viet Nam, that perpetuates a long and honored tradition of protest in this country. Our society long ago decided that government, at all levels, must be exposed to these attacks. But this right to dissent will become hollow if it is confined to the conventional media of communication. The impulse for protest often rises in those who cannot afford these media, or who, because of long deprivation, cannot frame the eloquent arguments they assume. If the protest is extreme, or the objects attacked sacred, radio, television, and the newspapers may simply shun all involvement. Furthermore, as suggested earlier, these demonstrations may far surpass these media in their impact. They confront people with a spectacle of commitment that cannot easily be dismissed.

But the peculiar values of these demonstrations, their availability to the alien, their immediacy, suggest their potential for trouble. They inevitably become sources of disorder, demanding police involvement. Here the police, to all appearance, acted responsibly. Yet their conduct raises grave questions about their role. They acted to terminate a demonstration independently of any formal licensing system. Only their judgment informed their discretion, a troubling fact for those who instinctively distrust the police. Yet the move to terminate came only after rigorous efforts to regulate the demonstration, first through the pre-demonstration agreement, then through the orders to return to the agreed areas. Perhaps these limited area regulations, designed to accommodate conflicting interests, should be sanctioned as a valuable technique of control. However, these restrictions were, in part, conditioned by the presence of hostile, or potentially hostile, crowds. Perhaps it seems anomalous to allow the presence of such crowds to restrict the movement of the demonstrators. The police, arguably, should have moved against that crowd. There are, of course, no easy answers, but the police, at least in Philadelphia, despite all these uncertainties, do approach these demonstrations with unusual skill and assurance.

II.

The Civil Disobedience Unit was created in February of 1964 by former Philadelphia Police Commissioner Howard Leary. Civil rights demonstrations, occurring with increasing frequency, had ex-

hausted the existing technique of control — summoning together, at word of a demonstration, available members of other units, such as detective or traffic, and ordering this potpourri of talent to function as an organized unit.[8] Often this unit, undermanned and inexperienced, could not do its job, and the other units, forced to provide men, were seriously handicapped. The Civil Disobedience Unit, composed of a lieutenant, a sergeant, four policewomen and eighteen policemen, would provide a stable reservoir of demonstration specialists, carefully selected and schooled.

The present Unit has no member with less than ten years of experience on the force. All were selected with this ideal officer in mind:

> 1. *He is a seasoned, experienced policeman.* He has walked the beat, patrolled in a prowl car, found lost children and settled family arguments. . . . In other words he's a good cop — like rare wine — aged by years of activity.
> 2. *He is a self-disciplined enforcer of the law.* He controls his temper at all times, resisting the taunts, slurs, and insults designed to make him blow his top. . . . He performs his tasks with cool, methodical, lawful skill, secure in knowing his self-discipline is stronger than the discipline of the "ism" groups he faces. He frustrates them in their efforts to shout "police brutality" to cover up their own lack of self-control.
> 3. *He is coolly courageous under fire.* He expects bad days when rough tactics are used. . . . Standing unflinchingly before menacing and undisciplined bands of way-out citizens, who espouse numerous borderline causes, he represents the courageous thin blue line between order and anarchy.
> 4. *He is unprejudiced with a firm belief in the equality of man.* To him, the Bill of Rights and the Constitution are not just words on a paper, but a way of life. . . .
>
> . . . Unprejudiced, unbiased, unbigoted, he acts as an ethical example to others on the picket line, at the rally, or in the meeting.
> 5. *He is intelligent, verbal, poised, and courteous.* His keen mind produces intelligent well-placed words to the dissident groups or leaders that may avert violence and arrests. His warm personality enables him to develop informants, inspire trust and maintain cooperation and order under tense circumstances.[9]

It is easy to smile at this hopeful elaboration of the CD man. The author concedes that "some administrators may feel the combination of these traits and skills can only be found in superman," but he argues that "a close look at a police department of any size will reveal 'gems' waiting to be polished and placed in the CD setting."[10]

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[8] Most of the information on the Civil Disobedience Unit was obtained from a lengthy interview with Captain Michael Rotman, the present head of the CDU, and Lt. George Fencl, his principal assistant, and the most experienced demonstration officer in the city.

[9] Fox, *The CD Man,* THE POLICE CHIEF, Nov. 1966, at 20, 24-25. (The author, Harry G. Fox, is Chief Inspector, Philadelphia Police Dep't.)

[10] *Id.* at 25.

Perhaps. But the more important point, distinct from the reality of these standards, is the emphasis they reflect. Harsh, impulsive enforcement must be avoided; there must be no hint of discriminatory or vindictive policing. Thus all CD men receive a week of lectures from Dr. Charlotte Epstein, a sociologist at the Albert Greenfield Institute on Human Relations. She teaches them, in the words of Lt. Fencl, "how not to be prejudiced." Curiously, this training in attitude control is not accompanied by any training in crowd control. Such skill, at least in part, is assumed.

However, the indifference toward crowd control training can also be explained by an essential tactic of the Civil Disobedience Unit — the emphasis, evident in the July 4th demonstration, on pre-demonstration preparations. Lt. Fencl, as the principal strategist of the CDU, has worked hard to establish good relations with leaders of the most active demonstrating groups in Philadelphia. These leaders, at least 90 percent of the time, either by telephone, letter, or more informal contact on the street, will notify the CDU of the time, site, and scope of a demonstration. This arrangement helps the CDU to devise an effective control plan, and it assures the demonstrators of adequate protection. Indeed, Lt. Fencl feels that the police are so frequently given advance warning because the demonstrators recognize their need for police protection. However, the CDU does not rely completely on this cooperation. Its members will often attend meetings of these groups, hoping to get news of demonstration plans, and, equally important, hoping to understand the composition and strategy of these groups. These intelligence efforts also involve the collection and distribution to the Unit of the literature of the demonstrators. Effectively compiled and absorbed, this information can make control at the scene much easier:

> At the scene of the demonstration, the skilled CD officer will quickly identify the leaders. He'll be able to point out the various combinations of organizations represented. Knowing the picket captains, groups and demonstrators, he anticipates their moves and can advise the ranking officer whether to expect violence, vandalism, arrests and prosecutions, or non-violence that will be orderly and lawful.[11]

Unfortunately, however, familiarity with the aims and techniques of the demonstrating groups will not eliminate much of the uncertainty from the demonstration site. The demonstrators themselves do not follow iron rules. And, almost always, they will confront a hostile crowd that follows no rules. Lt. Fencl is convinced that these crowds often pose real threats of violence. Occasionally, the threat bears no relation to any position that the demonstrators espouse. The mere presence of a crowd can be incendiary, particu-

[11] *Id.* at 22.

larly to those who are inconvenienced; there are always thugs around who will attack anything. Lt. Fencl vividly remembers an incident where one pro-war group harassed another, having assumed that any group demonstrating on the streets must be against the war. But the majority of the attacks do have some ideological content, however crude, and the police view this kind of hostile crowd with a curious ambivalence. They begin, in this statement of Captain Rotman's, by granting the hostile crowd a limited constitutional right: "We are [referring to the CDU] referees between the constitutional right of the demonstrators to assemble and the right of the hostile crowd to speak against them." This statement, of course, says nothing about the hostile crowd that moves from invective to violence. Such a crowd, presumably, would lose all claims to protection. But the statement does suggest a neutrality between opposing rights which, in the situation that threatens to become violent, is probably illusory. The police simply do not like these demonstrators.

Chief Inspector Fox, while detailing his ideal CDU man, refers to "the -ism groups," these "undisciplined bands of way-out citizens who espouse numerous borderline causes." He insists, of course, that their rights must be protected. Similarly, Lt. Fencl, in response to a question about the hostile crowd, asked his own question: "If you have a hostile crowd of one hundred, and two speakers, what's the easiest thing to do? You stop the two." Lt. Fencl, however, did not like this response and, erasing a smile, quickly added that, in reality, you would first try to control the crowd. Both Chief Inspector Fox and Lt. Fencl are fully aware of the paper rights of these demonstrators. Both recognize that denial of these rights, no matter how minimal, produces claims of police brutality and bad publicity. But, in their guts, like most policemen, they regard these demonstrators as foolish, potentially dangerous, nuisances. In a tense situation, where the police must assign responsibility for threatened violence, that fundamental aversion can control judgment.

The architects of the CDU, knowing this danger, try to avoid the crisis situation — thus the emphasis on pre-demonstration intelligence and planning. This emphasis is particularly apparent in their approach to traffic problems. If the officers fear that a demonstration, announced in advance, might disrupt motor traffic, they do not hesitate to re-route traffic around the area or set up no parking zones. If they have had no warning, they may be more reluctant to unsettle traffic patterns, but, if the demonstration cannot be confined to sidewalks, they may move against the traffic. Generalizations, the officers insist, are impossible. However, they do not feel that traffic must necessarily prevail in the streets. The demonstrators also have compelling claims to their use.

If all these preparations fail, however, and a crisis develops, then the CDU, aware of its inevitable predilections, confronts the danger it fears most: the possibility of clumsy, impulsive arrests, with the concomitant bad publicity. Chief Inspector Fox states the danger well:

> The average policeman doesn't enjoy guarding a picket line or protecting and preventing demonstrators from being attacked. It usually means long, hot, boring hours in one spot. Couple this with endless chants, attempts to bait him by pretending to sit down or block traffic, then add goading remarks, many of which are obscene, and you have produced irritated and anxious police officers.
>
> Such a situation may result in an increased desire to make quick and forceful arrests, or to answer with threats and retaliatory obscenities on the part of the officers.
>
> If this occurs, a hue and cry goes up from the ranks of the civil rights groups with charges of "police brutality," "verbal brutality," "police threats," and "unfit to be law officers" hurled at the police department. Demands are made on the Mayor and Police Commissioner to punish the culprit policemen.
>
> The civil rights demonstrators often enlist the aid of the news media, usually giving "academy award" performances, with the grimaces and groans of a horror movie. They rush to appeal to the Police Review Board, the Police Discipline Board, the FBI and the courts, charging illegal arrests by bigot cops.[12]

Here, again, the distrust and dislike of the demonstrators are clear. Their principal aim, the feeling goes, is to embarrass the police. That aim must be thwarted. On a mimeographed sheet entitled *Procedure for Civil Disobedience Teams,* distributed to all members of the Unit, there appears, in bold letters, this instruction:

> *AVOID PICAYUNE ARRESTS*
>
> a. Arrest is the successful climax of any protest demonstration and can be interpreted as a denial of the right to demonstrate; therefore, be discreet in avoiding arrest for intoxication or Minor Breach of the Peace.
>
> b. Have the group leaders or coordinators remove any visibly intoxicated persons or undesirables from the picket line. When this can only be accomplished by an arrest, be tactful in executing the arrest.

The arrest procedure is broken down into several stages, all designed to insure tact. If the demonstration occurs on a highway or street, and the law is violated, the arresting officer, addressing himself to the demonstrator, must first announce: "You are interfering with the free movement of vehicular and pedestrian traffic — please move." After waiting a few seconds for responsive action, he again asks, "Will you move?" If there is a refusal or non-compliance, he informs the demonstrator of his offense: "Your action prohibits the safe and peaceful movement of persons and vehicles

[12] *Id.* at 24.

in the public streets and prevents access to the buildings. This is a violation of Section 406 of the Pennsylvania Penal Code entitled Disorderly Conduct." He again asks the demonstrator if he will move. If, again, there is refusal or non-compliance, he states: "You are now under arrest and charged with Disorderly Conduct. Will you walk to the Emergency Patrol Wagon?" If the demonstrator refuses, he asks, "Do you insist on being carried to the Emergency Patrol Wagon or will you walk?" After waiting a few seconds for a reaction, he states: "I wish to advise you that you will be in violation of Section 314 of the Pennsylvania Penal Code if we carry you to the Patrol Wagon and the additional charge of resisting arrest will be placed." Thus ends the drama.

If the demonstration occurs in a building, hallway, or office, the routine is similar except for the explanation of the charge, which looks to the peculiar function of the building or office: "You are interfering with the normal business operation of this (office, building, hallway). Please move." Arrests, in fact, are few. From January to September, 1966, a period during which there were 271 demonstrations in Philadelphia, there were only 53 arrests.[13] Most of these occurred on July 4th at Independence Hall.

The police were not happy about these July 4th arrests. They were highly publicized, and those CDU men who made the arrests would now have to spend long hours in court telling their story. They would face searching cross-examination, often fierce, and they would not be surprised if, after all their efforts, the convictions were thrown out. They did not doubt, from their own perspective, the rightness of their actions. But the Supreme Court of the United States, increasingly involved in the problems created by demonstrations, had been reversing convictions in this area. Lt. Fencl knew these decisions well, and he was troubled by their preoccupation with Southern law enforcement. But now, in the *Adderley v. Florida*[14] case, he saw a glimmer of hope, though he was not sure just what the decision meant.

III.

The seminal case on the law of demonstrations, as announced by the Supreme Court, is *Cantwell v. Connecticut,*[15] which involved no demonstration. Cantwell and his two sons, members of the Jehovah's Witnesses, as part of an effort to obtain contributions for their cause, stopped two men on a New Haven street, asked, and received

[13] Fifty of these arrests were for disorderly conduct and breach of the peace. Three were for illegal possession of explosives. Letter from Captain Michael Rotman to author, Dec. 9, 1966.

[14] 385 U.S. 39 (1966).

[15] 310 U.S. 296 (1940).

permission to play a phonograph record called "Enemies." The record attacked Catholicism, the religion of the two men, and they quickly became incensed, threatening to strike Cantwell if he did not leave. He left. Subsequently, he was charged with the common law offense of inciting others to breach of the peace. There apparently was no evidence that he had been personally offensive. Only his message aroused.

The Supreme Court reversed the conviction, relying heavily on Cantwell's use of a public street and his controlled conduct:

> Cantwell . . . was upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others. There is no showing that his deportment was noisy, truculent, overbearing or offensive. . . . It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he had invaded no right or interest of the public or of the men accosted.[16]

This analysis embodies three themes that will persist throughout this area: (1) the street as a legitimate forum for the peaceful expression of ideas; (2) the need to subordinate this use to the primary uses of the streets, such as traffic; and (3) concern with the conduct of those who use the streets to promote their causes. However, this latter concern was not directly responsive to the conviction before the Court. Cantwell himself had not breached the peace. He was convicted of inciting such a breach in others. The Court conceded that such an offense existed, but only in the narrowest circumstances:

> One may . . . be guilty of [breach of the peace] . . . if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. . . .
>
> [Here] we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.[17]

In effect, the Court, confronted with a conviction under a breach of peace statute, has carefully circumscribed the legitimacy of convictions based on hostile crowds, though, in fact, it deals only with a situation where one man faces another. Cantwell, involved in a peaceful effort at persuasion, cannot be blamed for the violent reaction of his listener. His speech, if it is to be punished, must have forced the provocation: "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safe-

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[16] *Id.* at 308.

[17] *Id.* at 309-10.

guarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."

If the Court's analysis had rested here, one could conclude that Cantwell's conduct could not, under any circumstances, be punished by the State. But the Court refuses to go that far. The State could have passed a statute reflecting its judgment

> that street discussion of religious affairs, because of its tendency to provoke disorders, should be regulated. . . . Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.[18]

Because the State has not passed such a statute, the Court, looking to the facts of the case before it, must decide if "the petitioner's communication, considered in the light of the constitutional guarantees, raised [such a] clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."[19] The Court concluded that it did not. But, by introducing the clear and present danger test, the Court suggests that Cantwell's peaceful conduct, wholly persuasive in intent, could, under certain compelling circumstances, be terminated. The Court's apparent effort to protect the responsible speaker from the irresponsibility of his audience was just that, appearance. Inevitably, the clear and present danger test will draw much of its content from that audience. Also, the Court has withdrawn from its strong statement that a man has the right to use the streets to impart his views peacefully. If the State decides that such a use constitutes a clear and present danger to a substantial interest, it can regulate that use. These affirmations and withdrawals shroud *Cantwell* in ambiguity, a troubling feature for a seminal case.

Chaplinsky v. New Hampshire[20] also involved a member of the Jehovah's Witnesses and a face-to-face encounter on the street. Chaplinsky was distributing religious literature on the streets of Rochester when a disturbance occurred at a busy intersection. A traffic officer started with Chaplinsky for the police station. On the way they encountered a Marshal Bowering, who was hurrying to the scene of the disturbance. The Marshal repeated an earlier warning he had given to Chaplinsky, who replied with some harsh words: "You are a God damned racketeer and a damned fascist and the whole government of Rochester are fascists or agents of fascists." These words formed the substance of the complaint under the following statute:

> No person shall address any offensive, derisive or annoying words to any other person who is lawfully in any street or other public

[18] *Id.* at 307.

[19] *Id.* at 311.

[20] 315 U.S. 568 (1942).

> place, nor call him by an offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.[21]

The Supreme Court of New Hampshire read this statute narrowly, confining its application to those words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[22] Such words were to be defined in terms of "what men of common intelligence would understand would be words likely to cause an average addressee to fight."[23] The United States Supreme Court, accepting this construction, affirmed Chaplinsky's conviction:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. [Footnotes omitted.][24]

This statement elaborates a widely-accepted theory of the First Amendment — there are certain forms of speech, lacking any social value, irrelevant to any effort to persuade, that are outside the scope of constitutional guarantees. The validity of that theory can be disputed. For our purposes, in the context of *Chaplinsky,* its importance rests with its emphasis on words that can result only in provocation. Chaplinsky, using such words, was exclusively engaged in the personal abuse the Court did not find in *Cantwell* where, ultimately, the conduct had to be described as an effort to persuade. *Chaplinsky,* of course, would be a much more difficult case if the abusive words were tied to the kind of appeal found in *Cantwell.* Its rationale, framed in terms of verbal act, is valid only so long as these abusive words are the sole content of the speech. But *Chaplinsky,* though its rationale is limited, provides an effective counterpoint to *Cantwell.* Cantwell, the petitioner, whatever his folly, was involved in an appeal to reason. He provoked the breach of peace only because his listener disliked his views. Chaplinsky was involved in no such appeal. He provoked the possibility of breach because men will not tolerate personal abuse. Cantwell cannot justly bear the responsibility for disorder. Chaplinsky must bear it. This distinction, of course, is not fast. The clear and present danger test, applied in the

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[21] N.H. REV. STAT. ANN. § 570.2 (1955).

[22] State v. Chaplinsky, 91 N.H. 310, 313, 18 A.2d 754, 758 (1941).

[23] *Id.* at 320, 18 A.2d at 762.

[24] 315 U.S. at 571-72.

Cantwell situation, could completely obliterate it. But the distinction does suggest a mode of analysis that should become important when Cantwell and Chaplinsky become a mass of protesters in a public open space. Those cases will also involve breach of peace convictions. They should also involve a conscientious effort to justly place the responsibility for that breach.

In *Terminiello v. Chicago*[25] Mr. Justice Douglas concerned himself with precisely this problem. Terminiello was found guilty of disorderly conduct because of a speech he delivered in a Chicago auditorium to the Christian Veterans of America. The auditorium was filled to capacity, and outside a crowd of about one thousand persons gathered to protest the meeting. A cordon of policemen attempted to maintain order, but they were not able to prevent several disturbances. Terminiello, in his speech, condemned the conduct of this crowd, and also criticized a variety of political and racial groups. The state, focusing on this speech, tried to bring it within the rationale of *Chaplinsky,* arguing that it was composed of derisive, fighting words which carried it outside the scope of the constitutional guarantees. But Mr. Justice Douglas never reached that troublesome issue. The trial court had charged the jury that it could find a breach of the peace if the defendant's conduct "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[26] Mr. Justice Douglas objected to the charge:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . . That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . .
>
> The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.[27]

These are justly famous words, elaborating the First Amendment in the dynamic sense that alone is meaningful. If the clear and present danger test must be used, and Justice Douglas does not abandon it, it must be used only in relation to an evil of grave proportions. Problems of local disorder may or may not assume such

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[25] 337 U.S. 1 (1949).

[26] *Id.* at 3.

[27] *Id.* at 4-5.

proportions. Until they do, "the appropriate response of the community . . . should lie in affording [the speakers] adequate police protection."[28] Certainly this is the logic of Justice Douglas' position. Terminiello, like Cantwell, could not be charged with the disorder of those who opposed him.

Justice Jackson, in a long dissent, bitterly attacks the refusal of the majority to confront the actual circumstances of the case. That evasion, he argues, allied with the majority's abstractions, invites disaster:

> Terminiello's victory today certainly fulfills the most extravagant hopes of both right and left totalitarian groups, who want nothing so much as to paralyze and discredit the only democratic authority that can curb them in their battle for the streets.[29]

This smacks of hysteria, justified, perhaps, by Justice Jackson's recent experiences in Europe. Fortunately, the extravagant fears do not becloud his analysis. He states unequivocally his position that the actions of a hostile crowd can control the application of the clear and present danger test:

> "The question in every case is whether the words *used are used in such circumstances* and are of *such a nature* as to create *a clear and present danger* that they will bring about the substantive evils [rioting] that Congress (or the State or city) has a right to prevent." . . . In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate.[30]

That evidence, as reviewed by Jackson, includes threats directed at the speaker. It also includes "epithets . . . which Terminiello hurled at an already inflamed mob of his adversaries,"[31] much, suggests Jackson, in the manner of Chaplinsky. But this analysis is troubling. Chaplinsky uttered nothing but epithets. Terminiello delivered a long, rambling speech, much of it scurrilous and incendiary, but a speech nevertheless, one that presented a point of view. Jackson, dwelling on the incendiary, would summarize it as a prolonged provocation to riot, both to those sympathetic to the point of view and those opposed. If, in fact, Terminiello was urging a riot, then the case would be easy. The First Amendment does not protect purposeful incitement to riot. But Terminiello's speech was more complex than that, and the complexity demands caution. Jackson, outraged, would abandon caution, silencing Terminiello because, in

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[28] Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 932 (1963).

Professor Emerson, however, does not approve of the clear and present danger test. If the problems become too extreme even for police protection, "the ultimate recourse of the community is in martial law."

[29] 337 U.S. at 25 (dissenting opinion).

[30] *Id.* at 26.

[31] *Id.*

effect, he asked for trouble and he got it. This proposition becomes even more startling when one remembers that Terminiello was speaking inside a hall, and that, as Chief Justice Vinson points out in his dissent, most of the trouble was caused by people outside the hall who did not even hear the speech.[32] Censorship by a hostile crowd could not be more blatant.

Jackson, of course, recognizes the dangers of his position. He warns that "courts must beware lest they become mere organs of popular intolerance."[33] But he feels that his Court, forced to review the actions of local authorities, must defer to the judgment of those authorities who alone could make free speech a meaningful right:

> [I]f free speech is to be a practical reality, affirmative and immediate protection is required. . . . Terminiello's theoretical right to speak free from interference would have no reality if Chicago should withdraw its officers to some other section of the city, or if the men assigned to the task should look the other way when the crowd threatens Terminiello. Can society be expected to keep these men at Terminiello's service if it has nothing to say of his behavior which may force them into dangerous action?[34]

This statement presents disarming logic. But, carefully considered, that logic is pernicious, for it suggests that the more intensely a speaker is pressed by a hostile crowd, the more tightly he can be controlled by the police, even to the point of silence. Jackson apparently feels that an ordered society, at this moment in time, must adopt this position:

> As a people grow in capacity for civilization and liberty their tolerance will grow, and they will endure, if not welcome, discussion even on topics as to which they are committed. . . . But on our way to this idealistic state of tolerance the police have to deal with men as they are.[35]

Again the statement, with its sad resignation, is disarming. But this resignation reveals a fundamental misapprehension of the import of the First Amendment, which commands an assumption precisely contrary to that which Jackson advocates. We must assume that we are in the idealistic state of tolerance, and that, when tolerance fails and crowds grow hostile, the officials must move against that aberration. Only thus can we maximize the value choice that has already been made for us in the First Amendment.

First principles, unfortunately, are easily forgotten. In *Feiner v. New York*[36] the Court sustained the breach of peace conviction of a man who had been addressing an open-air meeting of about 75 or 80 people in Syracuse, urging them to attend a meeting scheduled

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[32] 337 U.S. at 8 (dissenting opinion).

[33] 337 U.S. at 33 (dissenting opinion).

[34] *Id.* at 31-32.

[35] *Id.* at 33.

[36] 340 U.S. 315 (1951).

for a Syracuse hotel that night. But Feiner also made derogatory remarks about President Truman, the American Legion, the Mayor of Syracuse, and other local political officials. The police further testified that, speaking before a mixed audience, he gave the impression that he was trying to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights. Such statements created excitement, and several onlookers made remarks to the police about their inability to handle the crowd. At least one member of the crowd threatened violence if the police did not act. Other members apparently favored Feiner's speech. Fearing that members of the crowd would turn against each other, the police asked Feiner to stop speaking. He refused. Again he was asked and again he refused. The crowd began to press closer around Feiner and an officer. Finally, having asked Feiner to stop talking three times over a space of four or five minutes, the officer told Feiner he was under arrest. He ordered him down from his box and then reached up to grab him.

Chief Justice Vinson, writing for the majority, approves of the police performance:

> It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here, the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.[37]

This statement, as Black argues in dissent, may not accurately portray the facts in the *Feiner* case, but, doctrinally, it seems impeccable. *Chaplinsky* is the precursor. Both cases would stand for the narrow proposition that speech, unrelated to any exposition of ideas, designed only to stir violence, can be silenced by the police. Admittedly, as we saw in *Terminiello,* it would be a rare speech that was unrelated to any exposition of ideas. Thus, and rightly so, the just grounds for silencing would be equally rare. But *Feiner* cannot be confined to this narrow proposition. Vinson, adopting Jackson's approach, further emphasizes that there were people in the crowd who obviously disliked Feiner's speech and who threatened violence if he were not stopped. This analysis undermines the incitement to riot ground, dwelling upon violence directed against the speaker, rather than on violence that he urges his audience to initiate. Vinson then drives the point home: "Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered."[38] This is sophistry, urging a distinction that is completely illusory. The content of the speech forces the reaction. If that content has any claims to constitutional

[37] *Id.* at 321.
[38] *Id.* at 319-20.

protection, if it is not simply incitement to riot, then the reaction of a hostile crowd cannot, under a proper view, deprive it of those claims.

Justice Black, dissenting, takes this view. Though he quarrels with the majority's deference to the findings of the trial court, arguing for an independent review of the facts, he is willing to accept their summary of the situation:

> Even accepting every "finding of fact" below, I think this conviction makes a mockery of the free speech guarantees of the First and Fourteenth Amendments. The end result of the affirmance here is to approve a simple and readily available technique by which cities and states can with impunity subject all speeches, political or otherwise, on streets or elsewhere, to the supervision and censorship of the local police.[39]

Black fully recognizes the implications of his position. He is demanding that the police, even in the critical situation found in *Feiner,* make affirmative efforts to protect the speaker:

> I reject the implication of the Court's opinion that the police had no obligation to protect petitioner's constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. Here the policemen did not even pretend to try to protect petitioner. . . . [T]he crowd was restless but there is no showing of any attempt to quiet it; pedestrians were forced to walk into the street, but there was no effort to clear a path on the sidewalk; one person threatened to assault petitioner but the officers did nothing to discourage this when even a word might have sufficed. Their duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.[40]

Black's lengthy analysis of the duties of the police illuminates a unique element in the *Feiner* case — the crowd of people gathered for a meeting on a public street. In *Cantwell* and *Chaplinsky* only one man addressed another on the street. In *Terminiello* the meeting was held in a public auditorium. But Feiner asked people to congregate on a street corner, and, if they had not responded, his effort would have been meaningless. Black recognizes that the public assembly creates special problems, but he is untroubled by them. If pedestrians were blocked or forced into the street, the police should have cleared a path for them. Their inconvenience would not justify termination of the speech. The point is intriguing, particularly because Black will later become terribly troubled by the threats to community order of demonstrations held in public settings. There he will focus sharply on the disruptions caused by these public assemblages, arguing that such gatherings are more than speech, and thus susceptible to greater regulation. But, on any realistic view, the

[39] *Id.* at 323 (dissenting opinion).

[40] *Id.* at 326-27.

allegedly pure speech situation found in *Feiner,* involving, inevitably, the large public crowd, poses precisely the same control problems as these later cases. This fact should warn us that, as we move into the demonstration cases, free speech analysis may be far off point.

Edwards v. South Carolina[41] is the first demonstration case. One hundred and eighty-seven Negro students walked in small groups of fifteen to the South Carolina State House grounds, an area of two city blocks open to the general public. The students, entering the grounds through a driveway and parking area, were told by the law enforcement officials that they had a right, as citizens, to go through the State House grounds, as long as they were peaceful. During the next half hour or 45 minutes, the students, in the same small groups, walked single file or two abreast in an orderly way through the grounds, each group carrying placards that stated: "I am proud to be a Negro" and "Down with segregation." During this time a crowd of 200 to 300 onlookers had collected in the horseshoe area (the parking area) and on the adjacent sidewalks. Wary of this crowd, the police authorities advised the students that they would be arrested if they did not disperse within fifteen minutes. Instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant" conduct, which, as his later testimony made clear, consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands. After fifteen minutes had passed, the police arrested the students and marched them off to jail.

Justice Stewart, writing for the majority, begins with a broad stroke: "[I]t is clear to us that in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances."[42] He adds that

> the circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. The petitioners felt aggrieved by laws of South Carolina which allegedly "prohibited Negro privileges in this State." They peaceably assembled at the site of the State Government and there peaceably expressed their grievances "to the citizens of South Carolina, along with the Legislative Bodies of South Carolina."[43]

Justice Stewart has linked together rights of speech, assembly, and petition. He suggests that this case involves all in their pristine and

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[41] 372 U.S. 229 (1963).

[42] *Id.* at 235.

[43] *Id.*

classic form. But, abandoning all analysis of free assembly and freedom to petition, he proceeds to analyze the case in the free speech terms of *Feiner* and *Chaplinsky,* arguing that here no speaker passed the bounds of argument or persuasion and incited to riot, or challenged with any "fighting words." Under this analysis, the demonstration simply becomes a massive effort at non-verbal communication. Stewart continues in this vein, turning next to *Cantwell* and its warning that a broadly defined breach of peace offense must not be used to punish the exercise of free speech. Finally, he turns to *Terminiello*: "[T]he courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech 'stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of these grounds may not stand.' "[44] Again, the words are stirring, but they are not appropriate. The demonstrators, unlike Cantwell, Chaplinsky, Feiner, and Terminiello, were not simply making a speech. Justice Stewart recognized this fact when, at the outset of the opinion, he referred to free assembly and freedom to petition for redress of grievances. But, as he moved through his opinion, Justice Stewart never fulfilled the promise of this recognition.

In *Cox v. Louisiana*[45] that promise remains unfulfilled. Two thousand Negro students from Southern University in Baton Rouge, determined to protest the arrests of fellow students who had picketed stores that maintained segregated lunch counters, assembled across the street from the courthouse. Under the direction of Reverend Cox, the students lined up about five deep along the length of the block. Several of them carried signs similar to those which had been used the day before. The messages were terse: "Don't buy discrimination for Christmas" and "Sacrifice for Christ, don't buy." Certain stores that segregated were proclaimed unfair. The students then sang "God Bless America," pledged allegiance to the flag, prayed briefly, and sang one or two hymns, including "We Shall Overcome." The students who were locked in jail cells in the courthouse building responded with their own singing. The demonstrators, in turn, responded with cheers and applause. Cox then made a speech urging the students to sit-in at the downtown lunch counters that had refused to serve Negroes, but he warned them against any violence. At this point a sheriff, over a loud speaker, announced that the demonstration now had to be broken up, that it had become inflammatory, a direct violation of the law, a disturbance of the peace. Cox and his demonstrators did not move. Several sheriff's deputies then moved across the street and put their hands on some of the

[44] *Id.* at 238.

[45] 379 U.S. 536 (1965).

students. A tear gas shell exploded. The demonstrators quickly dispersed. Cox was arrested the next day, and subsequently convicted of three offenses: disturbing the peace, obstructing public passages, and picketing before a courthouse.

The breach of peace conviction falls first on two grounds: "We hold that Louisiana may not constitutionally punish appellant under this statute for engaging in the type of conduct which this record reveals, and also that the statute as authoritatively interpreted by the Louisiana Supreme Court is unconstitutionally broad in scope."[46] But Justice Goldberg, writing for the majority, dwells principally on the first ground, subjecting the record to intense scrutiny. The singing, though loud, was not disorderly. There is no indication that the mood of the students was ever hostile, aggressive, or unfriendly, a conclusion supported by a film of the demonstration. Any fear of violence "seems to have been based upon the reaction of the group of white citizens looking on from across the street."[47] This being so, "the compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise."[48] With respect to the statute itself, Justice Goldberg notes that, as interpreted by the Louisiana Supreme Court, this statute "is at least as likely to allow conviction for innocent speech as was the charge of the trial judge in *Terminiello*."[49] Thus the statute is unconstitutional on its face.

There is nothing remarkable in any of these pronouncements. All were augured by *Terminiello* or *Edwards*. But Cox was also convicted, under a narrowly drawn statute,[50] of obstructing public passages, and there was no doubt from the record that the sidewalk across from the courthouse was obstructed. Such obstruction had,

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[46] *Id.* at 545. The statute reads:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregates with others . . . in or upon . . . a public street or public highway, or upon a public sidewalk, or any other public place or building, . . . and who fails or refuses to disperse and move on, . . . when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person, . . . shall be guilty of disturbing the peace.

LA. REV. STAT. § 14:103.1 (Supp. 1962).

[47] 379 U.S. at 550.

[48] *Id.* at 551.

[49] *Id.* at 552.

[50] No person shall willfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.

Providing, however, nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions.

LA. REV. STAT. § 14:100.1 (Supp. 1962).

of course, appeared in other cases, such as *Feiner* and *Edwards,* but there it was always thrown in as an element in the vague breach of peace charge. Justice Roberts, however, as early as *Cantwell,* had suggested that the exercise of First Amendment rights in the public setting must not impede the movement of traffic.[51] Now the State of Louisiana had embodied that view in a statute, insisting on its application to public assemblies which did not have as their specific purpose the obstruction of traffic. On its face, the statute precluded all street assemblies and parades, forcing a clear confrontation between the right of the state to forbid all access to streets and other public facilities for parades and demonstrations, and the right of the people to use those streets and facilities for public assemblies. The Court, however, avoided this delicate issue. Goldberg and four of his colleagues found evidence from oral argument and from the record that, in practice, the statute was administered by an informal permit system. Because this system rested on the unbridled discretion of local officials, it was, under a long line of First Amendment cases, unconstitutional.

Justice Black, however, did not evade. Though he found the statute unconstitutional on equal protection grounds, because of its explicit exception for picketing and assembly by labor unions, he stated unequivocally that "I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways."[52] This large concession to state power issues from Justice Black's familiar speech-conduct distinction: "Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited."[53] Justice Goldberg, though he does not indicate concurrence in the blanket prohibition, echoes this analysis:

> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.[54]

This is faulty analysis, sharing, with Stewart in *Edwards,* the misconception that a demonstration is nothing more than a non-verbal attempt at communication. In reality, this non-verbal communication, this conduct, is the public assembly accorded special

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[51] 310 U.S. at 304.

[52] 379 U.S. at 581 (concurring opinion).

[53] *Id.* In Cameron v. Johnson, 381 U.S. 741, 750 (1965), dissenting to a denial of certiorari, Justice Black reaffirmed this position. The Mississippi statute made it unlawful "for any person, singly or in concert with others, to engage in picketing or mass demonstrations . . . so as to obstruct or interfere with free use of public streets, sidewalks or other public ways adjacent or contiguous thereto." Such a statute, Justice Black argued, is not "overly broad in what it covers," nor does it "even undertake to forbid or regulate picketing or demonstrating on the streets (as I think it could — see *Cox v. Louisiana* . . .)."

[54] 379 U.S. at 555.

protection by the First Amendment. That assembly, particularly when it focuses on affairs of government, as Stewart recognized in *Edwards,* embodies values peculiar to itself: "[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are . . . a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom."[55] Black, of all people, blinded by his formal distinctions, refuses to recognize these values:

> The First and Fourteenth Amendment, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly, *where people have a right to be for such purposes.* This does not mean, however, that these Amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property. . . . Were the law otherwise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear.[56]

This is appalling. People moving through public settings do not become a captive audience. Freedom of assembly assumes a place to assemble; a guaranteed right of public assembly becomes hollow when groups can be excluded from public open spaces. The State, under the very terms of the First Amendment, simply does not have that power. Its efforts, under these same terms ("the right of the people peaceably to assemble"), must be limited to those which promote peaceful assembly. Here, in this limited context, regulations of demonstrations have their place.[57]

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[55] Kalven, *The Concept of the Public Forum,* 1965 SUP. CT. REV. 1, 11-12.

[56] 379 U.S. at 578 (concurring opinion).

[57] We have, in moving from *Feiner* to a discussion of *Edwards* and *Cox,* ignored three cases that are, conceptually, relevant to the demonstration problem: Wright v. Georgia, 373 U.S. 284 (1963); Taylor v. Louisiana, 370 U.S. 154 (1962); Garner v. Louisiana, 368 U.S. 157 (1961). All involved breach of peace convictions, but convictions based solely on evidence that the defendants had violated local segregation customs. In *Garner,* seven students took seats at a lunch counter in Kress' Department Store in Baton Rouge. In *Taylor,* six Negroes went into the white waiting room at a Shreveport bus depot. The Supreme Court, relying on Thompson v. City of Louisville, 362 U.S. 199 (1960), simply found no evidence to support the convictions. In *Wright* the defendants played basketball in a public park in Savannah. Here the Supreme Court, relying on the equal protection clause, found, in the ouster of the Negroes from the park, clear evidence of discriminatory enforcement.

But *Garner* did force a lengthy concurrence from Justice Harlan who, finding that the owner of the store had consented to the presence of the Negroes, treated their sit-in as a form of demonstration within the free speech guarantee of the First Amendment:

> Such a demonstration, in the circumstances of these two cases, is as much a part of the "free trade in ideas" as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion," . . . just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak . . . to mere verbal expression.

Garner v. Louisiana, 368 U.S. 157, 201 (1961) (concurring opinion).

This, of course, is the very analysis that was adopted, with such mischief, by Stewart in *Edwards* and by Goldberg and Black in *Cox.*

Justice Black's extreme position, conditioned in part by his speech-conduct distinction, also can be explained by his narrow view of the use of streets, and, no doubt, of other public facilities. Discussing the unconstitutional vagueness of the breach of peace statute in *Cox,* he notes that the statute "neither forbids all crowds to congregate and picket on streets, nor is it narrowly drawn to prohibit congregating or patrolling under certain clearly defined conditions while preserving the freedom to speak of those who are using the streets in the ordinary way that the State permits."[58] Black's concern is with the ordinary way — foot and motor travel. The freedom to speak of those involved in such uses must not be unduly curtailed. If the State passed a law regulating such use, and "if such a law had the effect of indirectly impinging on freedom of speech, press, or religion, it would be unconstitutional if under the circumstances it appeared that the State's interest in suppressing the conduct was not sufficient to outweigh the individual's interest in engaging in conduct closely involving his First Amendment freedoms."[59] For example, as Justice Black explains in his dissenting opinion in *Barenblatt v. United States,*[60] the need to control the streets in *Cantwell* could not justify the restriction made on speech. Where a man had a right to be on a street, "he had a right peacefully to impart his views to others."[61] But Cantwell, of course, was the isolated figure on the street, who talked only as he walked. His speech was pure; his conduct was conventional. But when Cantwell becomes a group, speech, in Black's view, becomes inextricably involved with conduct, and that conduct involves an extraordinary and inferior use of the streets. Again, Black refuses to recognize the implications of the right to free assembly. Assessing in *Cox* the impact of a plausibly constitutional breach of peace statute aimed at patrolling and marching, he even drops the right from the familiar recital, asking only "if such a law had the effect of indirectly impinging on freedom of speech, press, or religion."[62] Perhaps he senses that such a law would directly impinge on the right of free assembly. However, given his commitment to the ordinary uses of the streets, a commitment not present in *Feiner,* he is almost compelled to ignore that possibility.

In *Brown v. Louisiana*[63] the question of ordinary use becomes central because the demonstration has moved from a public open space, the site of most protest gatherings, into a public library that cannot, if it is to function as a library, accommodate such gatherings.

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[58] 379 U.S. at 577 (concurring opinion).

[59] *Id.*

[60] 360 U.S. 109 (1959).

[61] 310 U.S. at 308.

[62] 379 U.S. at 577 (concurring opinion).

[63] 383 U.S. 131 (1966).

Five young Negroes, angered by the segregation practices of the Clinton, Louisiana, library, walked into its adult reading room, where they were met by the assistant librarian. The petitioner Brown requested a book. The librarian, checking the card catalogue, found that the library did not have it. She told the Negroes so, and expected them to leave. But they remained. She then asked them to leave, but petitioner Brown simply sat down and the others stood near him saying nothing. The sheriff was not called, but within ten or fifteen minutes after the Negroes arrived at the library, the sheriff and deputies arrived. The sheriff asked the Negroes to leave. They said they would not. He then arrested them on charges of breach of the peace.

Justice Fortas recognizes at once that these Negroes were in the library to protest its segregation. Then, having accepted the fact of protest, he turns to the First Amendment:

> As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities. [Footnotes omitted.][64]

This statement, taken alone, seems to ignore much complexity. The defendants clearly had a right to use the library as a library. Their presence, for that purpose, could not be contested. But they used the library as a forum for their protest, and a library, unlike a street, cannot, ordinarily, accommodate such uses. Justice White, concurring, was troubled by this problem, but he voted for reversal because "the behavior of these petitioners and their use of the library building, even though it was for the purpose of a demonstration, did not depart significantly from what normal library use would contemplate."[65] Under this view there was, in reality, no conflict of uses, a fact that Justice Fortas finds crucial for his holding:

> Fortunately, the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. . . . Were it otherwise, a factor not present in this case would have to be considered. Here, there was no disturbance of others, no disruption of library activities, and no violation of any library regulations.[66]

This is an immense qualification, and it assumes even greater proportions when juxtaposed with a footnote Justice Fortas includes at the beginning of his opinion:

> Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the

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[64] *Id.* at 141-42.

[65] *Id.* at 151 (concurring opinion).

[66] *Id.* at 142.

> constitutionally protected demonstration itself, that their critics might react with disorder or violence.[67]

This is the most unequivocal statement yet made by a majority of the Supreme Court on the relevance of the hostile crowd. Their disorder simply cannot be charged to a peaceful demonstration. But does this principle apply when the public open space becomes a public building, such as a library? Apparently not, for Justice Fortas indicated that the disturbance of others might have deprived the library demonstration of its protected character. Certainly, on a street, disturbing others would not have that impact. Admittedly, Justice Fortas, in the two quoted statements, was not speaking of identical problems. In the library, others would be disturbed because they were frustrated in their attempts to use the library as a library. In public open spaces, such as a street, they might be disturbed simply because they dislike what they see and hear. The former reaction is legitimate, the latter, the hostile crowd, is not. But even on a street people might be disturbed because demonstrators prevent them from using the streets as they choose, perhaps for movement or play. Should these uses prevail, or should the street be susceptible to many uses? If Justice Fortas' footnote is read broadly, the answer is clearly the latter.

Justice Black, of course, is furious, and he writes his dissent with scant recognition of the narrow scope of the Fortas opinion. He insists that Fortas has not focused on the unique character of a library:

> The problems of state regulation of the streets on the one hand, and public buildings on the other, are quite obviously separate and distinct. Public buildings such as libraries, school houses, fire departments, courthouses, and executive mansions are maintained to perform certain specific and vital functions. Order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation. . . . It is incomprehensible to me that a state must measure disturbances in its libraries and on the streets with identical standards.[68]

This attack is unjustified, but the emphasis on the specific function of public buildings is cogent. Black strongly intimates, however, that this reasoning is not applicable to the streets, the site of most public assemblies. Is he relenting, adopting a more comprehensive view of the legitimate uses of public open spaces? Justice Black, as if in answer, sounds a warning:

> It is high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings, and property to protest

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[67] *Id.* at 133 n.1.

[68] *Id.* at 157 (dissenting opinion).

> whatever, wherever, whenever they want, without regard to whom it may disturb.[69]

Justice Black soon made this warning good.

In *Adderley v. Florida*[70] two hundred Negro students from Florida A & M University in Tallahassee marched from the school grounds to the county jail, determined to protest the arrests of other protesting students the day before, and to protest more generally against state and local policies of racial segregation, including segregation of the jail. The students went directly to the door of the jail, where they were met by a deputy sheriff who asked them to move back, claiming that they were blocking the entrance to the jail. They moved back part of the way, onto the jail driveway and an adjacent grassy area on the jail premises, where they stood or sat, singing, clapping, and dancing. Even after their partial retreat, however, the demonstrators continued to block vehicular passage over the driveway, which was normally used by the sheriff's department for transporting prisoners to and from the courts several blocks away, and by commercial concerns for servicing the jail. The sheriff finally told them they were trespassing upon jail property, giving them 10 minutes to leave. But the demonstrators did not move. After 10 minutes the sheriff again announced that he was the legal custodian of the jail and its premises, that they were trespassing on county property in violation of the law, and that they should all leave forthwith or he would arrest them. Some of the group then left. Others, including the petitioners, did not. They were arrested on a charge of "trespass with a malicious and mischievous intent" upon the premises of the county jail, contrary to Section 821.18 of the Florida statutes: "Every trespass upon the property of another, committed with a malicious and mischievous intent, the punishment of which is not specially provided for, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars."[71]

Justice Black, writing for a majority that affirms the convictions, begins by distinguishing *Edwards*: "Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not."[72] He then goes on to reduce *Edwards* and *Cox* to mere holdings of statutory vagueness, arguing that the convictions in those cases were vulnerable because South Carolina and Louisiana had proceeded under statutes "so broad and all-embracing as to jeopardize speech, press, assembly and petition, under the constitutional doctrine enunciated in *Cantwell v. Connecticut* . . . ."[73] The Florida

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[69] *Id.* at 162 (dissenting opinion).

[70] 385 U.S. 39 (1966).

[71] FLA. STAT. ANN. § 821.18 (1965).

[72] 385 U.S. at 41.

[73] *Id.* at 42.

trespass statute, however, cannot be so challenged: "It is aimed at conduct of one limited kind, that is, for one person or persons to trespass upon the property of another with a malicious and mischievous intent. There is no lack of notice in this law, nothing to entrap or fool the unwary."[74] Finally, Justice Black turns to the fundamental question — whether the State, by this narrow statute, has the power to force these demonstrators "from what amounted to the curtilage of the jailhouse."[75] The Justice has a ready answer, drawn from his efforts in *Cox* and *Brown*:

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only reasonable but also particularly appropriate. . . ." Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was . . . rejected in *Cox v. Louisiana.* We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.[76]

There is a troubling ambiguity in this opinion. In *Cox,* Justice Black said the State could ban picketing on its streets and highways. In *Brown,* he said the State could ban assembly to protect the specific and vital function of a public building. Both thoughts seem to be present here, perhaps because the site of the demonstration is itself ambiguous. Justice Black speaks of premises, which could mean a piece of land or a building, and "what amounted to the curtilage of the jailhouse,"[77] which suggests a yard within a wall. He intimates that security was threatened, and that a driveway used for commercial and jail purposes was blocked. These descriptions and facts are tied to the "specific and vital function"[78] theory. In reality, however, the demonstrators seem to have been on an open grassy area adjacent to the jail, barely related, if at all, to any specific jail function. Thus Justice Black uses the broad language of prohibition: "The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose."[79]

Justice Douglas, angered by both theories, composes a dissent that, at long last, fulfills the promise of *Edwards* and subjects these

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[74] *Id.*
[75] *Id.* at 47.
[76] *Id.* at 47-48.
[77] *Id.* at 47.
[78] *Id.* at 45.
[79] *Id.* at 48.

demonstrations to a proper analysis. He begins by recognizing that they are not problems of free speech. Rather, they implicate "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[80] These rights protect a distinctive appeal to government: "Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were."[81] Turning to Justice Black's contention that the functioning of the jail was impaired, Justice Douglas disputes him on the facts: "The evidence is uncontradicted that the petitioners' conduct did not upset the jailhouse routine; things went on as they normally would."[82] But he makes a further point, one that assumes some interference: "If there was congestion, the solution was a further request to move to lawns or parking areas, not complete ejection and arrest."[83] The conflicting uses, properly handled, could be accommodated. Justice Black had made a similar point in *Feiner,* arguing that the police, rather than silencing Feiner, should have attempted to clear a path for pedestrians. Justice Douglas concedes, however, that there may be instances where accommodation is impossible: "There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. . . . No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. . . . But this is quite different from saying that all public places are off limits to people with grievances."[84] Knowing that Justice Black would give this power to the state, Justice Douglas returns to the fundamental assertion of *Hague v. C.I.O.*:[85]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[86]

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[80] 385 U.S. at 48 (dissenting opinion).
[81] *Id.* at 50-51.
[82] *Id.* at 51.
[83] *Id.* at 52.
[84] *Id.* at 54.
[85] 307 U.S. 496 (1939).
[86] *Id.* at 515-16.

Edwards and *Cox,* despite their confused analysis of demonstrations, and despite Justice Black's effort to reduce their import, were decided in the tradition of *Hague.* Justice Douglas sees, in the majority's position, a sad fall from that tradition: "When we allow Florida to construe her 'malicious trespass' statute to bar a person from going on property knowing it is not his own and to apply that prohibition to public property, we discard *Cox* and *Edwards.*"[87]

IV.

Lt. Fencl's confusion over the precise import of *Adderley* is understandable. The case aptly climaxes an ambiguous line of cases. But if Lt. Fencl were asked to study these cases, he might, despite some bewilderment, come away convinced that he and his men had acted legally on July 4th. The conclusion would not be untenable. Looking to the language of Justice Roberts in *Cantwell,* and to Justice Black's repeated emphasis on the proper uses of streets and sidewalks, he might argue that the CDU, by imposing the area regulations, had acted to protect these uses. Looking to the language of Justices Goldberg and Black in *Cox,* he might argue that the Court has characterized these demonstrations as conduct, not speech, and that the power of the state to regulate conduct is unquestioned. Finally, surveying the complete line of cases from *Cantwell* to *Adderley,* he might argue that all of them involved instances of state termination of individual speech or group demonstration, and that, most notably in *Feiner,* the propriety of this termination in critical circumstances was recognized. The CDU, at least initially, did not even attempt to terminate a demonstration. It sought only to impose limited area regulations on a large demonstration which, if unregulated, posed a serious threat of disorder. Surely, Lt. Fencl might argue, the police have the power to do this much. Again, the claim seems plausible. But the Philadelphia Common Pleas Court which heard these arguments, in reviewing the convictions of the demonstrators, left the issue hopelessly confused.

The court dismissed the appeals of seven of the convicted demonstrators, explaining their culpable conduct in these terms:

> Defendants by sitting down and refusing to remove themselves from the area in question after being requested to do so by the police provoked interference with pedestrian traffic and hostile reaction by the public which gave rise to serious disorder that threatened to get out of hand. Their actions fully warrant their conviction of disorderly conduct.[88]

This holding was no surprise. Throughout the trial de novo, as each of the demonstrators took the stand, the judge carefully established,

[87] 385 U.S. at 53 (dissenting opinion).

[88] Commonwealth v. Brand, Docket Nos. 1286 *et seq.* at 10-11 (Phil. County C.P. No. 2, Pa., Dec. 5, 1966).

through his own questions, which of the demonstrators, after being ordered by the police back to the north side of Chestnut Street, simply sat down. Thus he prepared a record that would allow him to make a narrow, conventional decision. This effort becomes clear when he responds to the defendants' contention that the police order was illegal:

> It is no defense that these defendants may have believed that the police were acting illegally, nor can we accept their contention that their actions were a proper protest to this alleged illegality. There are proper methods by which to voice an objection to police action and disobedience of a police order under the circumstances in this case was not the proper method by which to voice one's objection.[89]

The judge's statement, on its face, is ambiguous, but he must mean that disobedience of a police order which takes the form of sitting on a crowded sidewalk cannot be tolerated. This assertion does not shock, nor does it illuminate the unique feature of the case. By finding culpable conduct only in those moments following the order to return to the designated area, the judge fails to assess the significance of the area restrictions and the propriety of the conduct that forced the order to return. He simply states that those demonstrators who did not sit down, in response to the order, were not disorderly:

> [T]hese defendants were advised that they were under arrest prior to the time when their activities might have resulted in disruption of the orderly flow of pedestrian traffic. The distribution of leaflets by these defendants did not constitute disorderly conduct.[90]

The judge must be saying that the police had no authority to order the demonstrators to return to the designated area, which further implies that they had no authority to confine the demonstrators at all. He even seems to be transforming the demonstration into instances of isolated leafleting, which has long been protected as an important form of free speech. But, at the end of his opinion, the judge re-recognizes the fact of a demonstration, and, in a strange exercise in irrelevance, he congratulates the police on a job well-done:

> We believe the police exercised their discretion properly in restricting each of these groups to a particular area in close proximity to the ceremonies which were taking place so that no disturbance would occur and pedestrian traffic would flow in an orderly fashion. In short, we believe the police must have some discretionary authority to impose narrow regulations on large demonstrations which, if not regulated, pose serious threats of disorder.[91]

Poor Lt. Fencl. First the judge says he and his men could not confine. Then he says they used their authority properly. And, even worse, if Lt. Fencl does gain some comfort from the judge's grant of au-

[89] *Id.* at 11.

[90] *Id.* at 8.

[91] *Id.* at 14.

thority, he would have to be told, by those wise in the law, that the judge's statement was a frail dictum.

But this statement, however much a gratuity in the Philadelphia court's opinion, contains wisdom that cannot be dismissed. The police must have the authority that the court calls for, and all those demonstrators who ignored that authority should have been guilty of disorderly conduct. This assertion does not deny the crucial value of that demonstration, nor does it imply approval of severe curtailment. Rather, it looks to Kalven's concept of the public forum, and the rules needed to order that forum: "[W]hat is required is in effect a set of Robert's Rules of Order for the new uses of the public forum, albeit the designing of such rules poses a problem of formidable practical difficulty."[92] The area restriction was such a rule, and its imposition by the police reflected, in reality, respect for the stature of demonstrations. Under the view of Justice Black, who would devote public open spaces to traffic flow or other ordinary uses, the police, assuming they acted without discrimination, pursuant perhaps to an obstructing the sidewalk statute, could have terminated the demonstration. The Civil Disobedience Unit, however, rejects this limited view of public open spaces, choosing instead Kalven's concept of the public forum. The choice, of course, makes the police task more difficult. Elimination of some conflicting uses would be easier than accommodation. But the choice is really not a choice at all. It is, under a proper view of the First Amendment, a constitutionally compelled decision.

The key is "the right of the people peaceably to assemble." Justice Stewart suspected this truth in *Edwards.* Justice Douglas affirmed it in dissent in *Adderley.* Today's demonstrations, like the one at Independence Hall, must be recognized as the modern form of public assembly, protected, like free speech and press, by the First Amendment. This assertion, admittedly, is not inevitable, and those who look to original meaning might argue that the assembly known to that early Congress was not the assembly of public protest. Constitutional history, if one looks for certainty, is inconclusive. But the right of assembly, when it was proposed for inclusion in the Bill of Rights, provoked an intriguing debate in the House of Representatives. Mr. Sedgwick of Massachusetts moved to strike the right, arguing that the free speech guarantee implied the right to assemble:

> If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that would never be called in question; it is derogatory to the dignity of the House to descend to such minutiae.[93]

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[92] Kalven, *The Concept of the Public Forum,* 1965 SUP. CT. REV. 1, 12.

[93] Jarrett & Mund, *The Right of Assembly,* 9 N.Y.U.L.Q. REV. 1, 35 (1931).

Mr. Tucker, however, did not find the right redundant, and he hoped that the words would not be struck out. Moreover, he urged the inclusion of a declaration, recommended by the states of Virginia and North Carolina, that the people should have a right to instruct their representatives, a suggestion which soon became the right to petition the government for a redress of grievances. To Tucker, this right to instruct, or petition, was the most material part of the Virginia and North Carolina recommendation, which had included both the right to assemble and petition.[94]

This emphasis is suggestive. Sedgwick saw assembly as no more than the inevitable gathering of people who are free to speak. But Tucker saw assembly as a gathering that serves its highest function when it challenges government. Without this ultimate right to petition, the assembly becomes mere gesture, devoid of impact. Indeed, since the days of Magna Charta, these two rights, of assembly and petition, have always been tied together. But, as originally conceived, these rights involved distinct moments in time. The lords assembled and then, having reached agreement, presented their grievances to the king. Tucker and his contemporaries undoubtedly saw assembly and petition as distinct acts, and the Supreme Court in *De Jonge v. Oregon*,[95] reflected this understanding. Holding that De Jonge's mere assistance at a meeting called by the Communist Party could not be punished under a criminal syndicalism statute, the Court affirmed the basic import of free assembly:

> The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. As this court said in *United States v. Cruikshank* . . . : "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."[96]

Here again, the people first meet, and then, having consulted, they frame a reasoned appeal to their government. If there is to be protest, the appeal will state it. But the assembly itself is only a quiet prelude.

Today's demonstrations, however, are not quiet preludes, and thus they do not conform to the ancient scheme perceived by Tucker and the Court in *De Jonge*. These demonstrations are, in themselves, acts of protest, immediate and provocative. They do not rely, for their impact, on any subsequent written appeal. Noting this difference, those intent on ancient practice could make the argument, suggested earlier, that these demonstrations cannot be defended as protected public assemblies. But this argument would be sadly formal.

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[94] *Id.*

[95] 299 U.S. 353 (1937).

[96] *Id.* at 364.

Public assembly was crucial because, as Tucker suggested, it promoted the more fundamental goal of petitioning the government, an act subsequent in time. Now, however, in the modern demonstration, the acts of assembly and petition occur simultaneously. But if the value of effective petition remains compelling, and it must, the fact of assembly, now, as then, must be protected. Thus Justice Douglas, in his dissent in *Adderley,* continually emphasizes the relationship between the act of assembly and the effectiveness of petition. Justice Douglas knew that the demonstrators were expressing much of their protest through the fact of assembly at the site of grievances, but he was untroubled by the spectacle: "The right to petition for the redress of grievances . . . is not limited to writing a letter or sending a telegram to a congressman . . . ."[97] The more dramatic petition, achieved by public assembly, must also be protected.

This argument has large implications. In *Williams v. Wallace*[98] the petitioners asked the district court to protect, through an injunction requiring adequate police protection, their right to assemble and demonstrate peaceably against the continuing denial of their right to vote. The demonstration would be unique — a march, involving hundreds of people, alongside U.S. Highway 80 from Selma, Alabama, to Montgomery, the state capital. Though disruption of highway traffic was assured, the district judge, announcing a new doctrine, issued the injunction: "[T]he extent of the right to assemble, demonstrate, and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against."[99] This doctrine has disarming appeal, particularly because it is so appropriate to the Selma case. The wrongs there were enormous. But, on any realistic view, the doctrine is untenable, involving the courts in even greater imponderables than a clear and present danger test. However, this doctrine, whatever its inadequacies, would never have been formulated if the court had not, at the outset, recognized the true import of the proposed demonstration:

> The attempted march alongside U.S. Highway 80 [this earlier march had been brutally blocked by Alabama officials] . . . involved nothing more than a peaceful effort on the part of Negro citizens to exercise a classic constitutional right; that is, the right to assemble peaceably and to petition one's government for the redress of grievances.[100]

The court, untroubled by the unique form of this assembly, then states a crucial link between assembly and petition:

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[97] 385 U.S. at 49-50 (dissenting opinion).

[98] 240 F. Supp. 100 (1965).

[99] *Id.* at 106.

[100] *Id.* at 105.

> The law is clear that the right to petition one's government for the redress of grievances may be exercised in large groups. Indeed, where, as here, minorities have been harassed, coerced and intimidated, group association may be the only realistic way of exercising such rights.[101]

At Selma the need for group protest was obvious. But, even in less threatening settings, only the solidarity of a group will encourage individuals to protest publicly on controversial issues. Deprive them of that solidarity and they will be mute.

The district judge in *Williams* recognized, of course, that the rights of assembly and petition which his injunction protected had to be reconciled, as far as possible, with the prevailing use of the highway. In part, he approached this problem by announcing his equivalence theory — large wrong means large right of protest, which here meant the extraordinary right to use an interstate highway as a forum for protest. But he also approached the problem more subtly. The Selma to Montgomery highway, according to the law of Alabama, was open to pedestrian traffic. Thus, reasoned the judge, "a reasonable use of the highways for the purpose of pedestrian marching is guaranteed . . . by the Constitution of the United States according to the principles above set out [referring to right of assembly and petition] . . . ."[102] The thrust of this argument is not completely clear. But apparently the district judge, unlike Justice Black, believes that any public way which is open to pedestrian traffic must accommodate more uses than simple walking. If these pedestrians want to become a group, using the public way as a forum for their protest, they have a constitutional right to do so, subject only to requirements of reconciliation with more conventional uses. Thus the judge, searching for this reconciliation, carefully scrutinized the detailed plans for the march. True, this argument of pedestrian use seems, in the context of this case, a make-weight, and the case itself is so extraordinary that any reliance on it in actual litigation will be risky. But the case, by its very uniqueness, reveals the dramatic potency of these neglected rights of assembly and petition. The court, if it had taken a more restricted view of those rights, would have dismissed the Selma March as an outrageous intrusion on the public convenience.

The Supreme Court, apart from Justice Douglas and his dissenting colleagues, is not yet so enlightened. Its refusal to recognize the *Edwards, Cox,* and *Adderley* demonstrations as instances of protected public assembly has led to the inept speech, speech-plus analysis, with its implication that demonstrations, speech-plus, can be severely regulated, even banned. Such analysis simply ignores the rights of

[101] *Id.* at 106.

[102] *Id.* at 107.

assembly and petition, permitting the Court to treat a case of public assembly "as if it were an ordinary trespass case or an ordinary picketing case."[103] The July 4th demonstrators, though involved in a much more modest effort than their Selma counterparts, were also exercising a fundamental right of public assembly which cannot be so reduced in stature. But that right, however fundamental, is a "right of the people peaceably to assemble." The "peaceably" qualification imports the limitations on the right which legitimize police efforts to regulate the demonstration. These efforts, at Independence Hall, were designed to accommodate potentially conflicting uses, and to prevent conflict with people and groups antagonistic to the demonstrators. Given this purpose and impact, the CDU's area regulation was constitutionally unobjectionable, a proper exercise of police discretion.

But the police must move cautiously. Their regulations could, if uncontrolled, undermine the value of demonstrations. The courts must involve themselves in the difficult task of reviewing the exercise of police discretion, assessing its impact on the demonstration in question. For example, at the July 4th demonstration, the limited area regulation, imposed so near to Independence Hall, did not deprive the demonstration of its ironic comment or its challenge to the speech of George Ball. It did not limit the size of the demonstration. Except for the south side of Chestnut Street in front of Independence Hall, the demonstrators were free to carry their signs and distribute their leaflets wherever they chose. They did, in fact, distribute leaflets at several points near the prohibited area, and, had they so chosen, they could have reached most of those people they cared to reach. They remained visible and provocative.

However, any effort to legitimize the area regulation as a simple attempt at accommodation of conflicting uses would be disingenuous. The regulation was designed, in substantial part, to protect the demonstrators from hostile crowds who, in their defiant reaction to the demonstrators, were themselves involved in no legitimate use of the streets. Justice Jackson, of course, would approve of this regulation. The provocative demonstrators must, in his view, submit to controls as the price of their need for protection, a troubling position because of the implications of its logic. But, as usual, there was wisdom in this candid argument. Demonstrations do derive some value from the intense reactions they force. They are designed to upset people. Public assembly, by its very nature, is provocative. The police, knowing this, prepare for hostility, just as they prepare for the people who simply want to walk freely along the street or into Independence Square. These preparations for the conflicting

[103] 385 U.S. at 49 (dissenting opinion).

uses can also provide simultaneous protection against the hostile crowd. So construed, these preparations seem legitimate, conditioned by proper considerations. The area regulation on July 4th was, in large measure, so conditioned. However, the impact of the hostile crowd on this regulation was real. Absent that crowd, the area regulation, conditioned only by a concern for traffic flow, might not have been so stringent. Thus the inquiry must turn to the impact of the regulation on the effect of the demonstration. If the hostile crowd forces a regulation that undermines the value of the assembly, then the regulation is improper. If, however, that crowd forces a regulation which, on a realistic appraisal, does not vitiate the impact of the assembly, then the regulation is proper. Such was the area regulation imposed on July 4th at Independence Hall.

All this, of course, is speculation, grounded in beliefs of what the law should be. The Supreme Court, in cases like *Edwards, Cox,* and *Adderley,* has simply not encountered the sophisticated control techniques used by Philadelphia's Civil Disobedience Unit. However, the Court recently confronted a case, *Turner v. New York,*[104] which, while it involved no sophisticated control techniques, offered the court an opportunity to clarify the importance of area restrictions, and, more fundamentally, to reappraise the constitutional stature of demonstrations. Unfortunately, over the objections of Justices Douglas and Fortas, the Court, having earlier granted certiorari, dismissed the writ as improvidently granted. But the *Turner* case, in its progress through the lower courts, and, ultimately, in its cautious dismissal by the Supreme Court, illuminates the confused state of the law of demonstrations. It merits the hard look the Supreme Court refused to give it. *Turner* involved a demonstration by the May 2nd movement, an anti-Viet Nam war group formed at Yale, held about 4:00 on a Saturday afternoon in Duffy Square, a triangular area in midtown Manhattan, extending from 46th to 47th Streets. The speakers at the meeting stood on the steps leading to a statue of Father Duffy towards the northern end of the Square, with the audience of 60 to 200 people in the center section. The police, at a subsequent trial on disorderly conduct charges, claimed that the meeting forced pedestrians into the street, which further disrupted motor traffic. Seeing this disruption, a police captain ordered the speakers to disperse the assembly, but they refused. The police captain withdrew, then returned a few moments later with another order to disperse, which again was ignored. Soon two policemen on horseback rode into the center of the Square

[104] 48 Misc. 2d 611, 265 N.Y.S.2d 841 (App. Div. 1965), *aff'd mem.*, 17 N.Y.2d 829, 271 N.Y.S.2d 274 (1966), *remittitur amended*, 18 N.Y.2d 683, 273 N.Y.S.2d 431 (1966), *cert. granted*, 385 U.S. 917 (1967), *writ dismissed, mem.*, 87 S. Ct. 1417 (1967).

where the audience was standing, accompanied by approximately a dozen foot patrolmen. This forceful intrusion quickly broke up the meeting, but most of the petitioners, members of the May 2nd group, tried to avoid the horses and to continue the meeting for some minutes, until the police stated they were under arrest. Then they quickly submitted. Most of the prosecution's evidence, as the petitioners emphasize in their brief, and as is apparent in the opinion of the Appellate Term, concerned acts of individual petitioners in the period between the move of the horses into the Square and petitioners' arrests. Nine of the prosecution's eleven witnesses were policemen who had come to the Square only at the time of the dispersal order. While the policemen described petitioners as running around in the Square and screaming, their screaming consisted mainly of calls to each other, condemnation of the police as "fascist cops," and claims of their right to assemble.

This demonstration, similar, in some respects, to the July 4th demonstration, raises troublesome issues. People have gathered in a public square, in the midst of a busy metropolitan area, to both protest and listen to a protest against government action. The assembly represents, in reality, a hybrid of *Feiner* and *Cox,* for it involves both the demonstrators, who here rely heavily on speeches, and those who have come to listen to them. Justice Black, depending on his predilection, could have found either pure speech or speech-plus in this setting. Then, having so found, he could have found for freedom or restriction. The distinction, however, is again absurd. *Feiner,* properly viewed, involved the same control problems as *Edwards* and *Cox,* most notably, the impact of the gathering on normal street uses. Here, in Duffy Square, that impact again is central. In the judgment of the police, the assembly became unlawful as soon as it obstructed pedestrians and vehicles, and their order to disperse was so premised. This judgment recalls July 4th, principally because it reflects a radically different police approach. The Civil Disobedience Unit, as it often does, allowed the anti-war demonstration to obstruct, within limits, the flow of pedestrians and vehicles. When those limits, represented by the area restrictions, were exceeded, the police, rather than ordering immediate termination of the demonstration, ordered the demonstrators to return to the designated area. The New York police allowed no obstruction, ordering immediate dispersal. Setting alone does not explain the different approach. Duffy Square is several blocks north of Times Square. The meeting was not in the middle of the street, nor did it occur during the rush hour. Accommodation of competing uses would have been no more difficult than it was at Independence Hall.

The defendants, of course, as did the defendants at Independence Hall, deny that there was any need for police intrusion. On July 4th, the demonstrators argue, there was, despite the testimony of the police, no threat of violence and no obstruction. At Duffy Square, the demonstrators argue, there was no significant obstruction until the police injected themselves. Both contend that the police had no authority to give their respective orders — one to return to a confined area, the other to disperse. In the Philadelphia case, the trial judge left this issue of police authority hopelessly muddled, though he made it clear that, in sustaining some of the disorderly conduct charges, he was focusing on the defiant response of some demonstrators to the order, legal or illegal, to return across the street. In the New York case, however, the complaint against petitioners specifically focused on conduct prior to the dispersal order, charging them with conducting an unlawful meeting — unlawful because they obstructed traffic, caused a crowd to collect, and used boisterous language. But at trial the state based its prosecution on the conduct of the demonstrators after the order to disperse, and the trial judge made no effort to limit the evidence to the acts specifically charged in the complaint. On appeal, the petitioners argued that this failure allowed conviction on a charge not made, in violation of due process. A New York Supreme Court rejected the argument, indicating that "evidence of a violation of any subdivision of section 722 of the Penal Law will support a conviction thereunder, regardless of whether the complaint charges a defendant under one particular subdivision or another."[105] It added that "there is ample [*sic*] in the wording of the complaint to justify sustaining the charges by evidence of conduct after the order."[106] One judge, however, accepted the petitioners' argument in dissent:

> [T]he evidence adduced on the trial was tangential, if not wholly irrelevant, to the only issue which could be properly agitated under the complaint, *i.e.*: the conduct of the defendants *before* police intervention. We may not perpetuate its vice here. The complaint was not adequate to sustain the charges upon which conviction was

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[105] 48 Misc. 2d at 619, 265 N.Y.S.2d at 848. The New York Disorderly Conduct Statute reads, in relevant parts:

> Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> . . . .
>
> 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> 3. Congregates with others on a public street and refuses to move on when ordered by the police;
>
> 4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd . . . .

N.Y. PEN. LAW § 722 (2)-(4).

[106] 48 Misc. 2d at 619, 265 N.Y.S.2d at 849.

> rendered by the trial court nor as the predicate of the offenses now pressed upon us to sustain that judgment.[107]

On appeal to the Supreme Court the petitioners continued to press this argument, and Justice Douglas, in his dissent to the dismissal of certiorari, emphasized that a conviction upon a charge not made is not consistent with due process. But if the Court had seized only this issue as the ground for its decision, it would have failed to clarify a vexing problem, found in *Turner* and in so many demonstration cases — what can demonstrators do in response to a police order they regard as illegal. Are they limited to stoic disobedience, or can they be more forceful? Most of the relevant law, as the majority opinion in the New York court emphasizes, involves responses to unlawful arrests, a distinction the New York court finds crucial. It concedes that

> [a]n unlawful arrest would afford a defendant "the right to resist and use 'force and violence' against the officer '. . . to prevent an offense against his person' provided such 'force or violence used [was] not more than sufficient to prevent such offense' . . . ."[108]

But this argument, it continues, "does not sanction the conduct set forth here in defiance of a police order to disperse — not in defiance of an unlawful arrest and, in fact, prior to any arrest."[109] The dissent, however, finds no force in this distinction, arguing that the demonstrators, "[c]onfronted with the police assault, . . . could legally do what was reasonably necessary to resist the unlawful aggression . . . . In this context, defendants were liable to criminal sanctions only if they pursued a 'counterattack . . . merely for the sake of revenge or the infliction of needless injury.' . . . The record shows none . . . ."[110] The dissent, in rejecting the distinction, is surely right. The police have authority to order dispersal only because, at that moment, they find unlawful conduct (assumed for the moment). If they had cared to, they could have arrested. Using their discretion, they simply chose another alternative — the order to disperse. Both arrest and order imply the same judgment and finality. Admittedly, some disorderly conduct statutes, such as subdivision three of the New York statute, make disobedience of a police order an element of the offense, but here too the refusal only becomes meaningful if the order itself is lawful. Moreover, since the public assembly in this case also violated subdivisions two and four of the New York statute, the police, at the moment of their order, had the authority to arrest, assuming, again, the illegality of the assembly. But it is precisely over this point, the legality of the assembly, that the ma-

[107] *Id.* at 632, 265 N.Y.S.2d at 862 (dissenting opinion).

[108] *Id.* at 621, 265 N.Y.S.2d at 851.

[109] *Id.*

[110] *Id.* at 631-32, 265 N.Y.S.2d at 861 (dissenting opinion).

jority and the dissenter contend most sharply. Finding the meeting unlawful, the majority sees the irresponsible violation of a lawful order, and thus demands well-mannered disobedience. The dissenter, finding the meeting lawful, would allow the demonstrators to respond aggressively to the unlawful acts of the police. The Supreme Court, had it confronted this conflict, might have found it impossible, and profitless, to avoid the fundamental issue in the case — the legality of the assembly in Duffy Square.

The majority's holding of illegal assembly does not rest on any finding of actual disorderly conduct prior to the dispersal order. Indeed, the majority emphatically states that "there is absolutely no showing here that defendants caused any *serious* annoyance to pedestrians or that their manner was threatening or abusive."[111] But the court does find that the police had authority to anticipate disorder:

> The police, in performing their duties, may give reasonable directions. Present at the point where the defendants were congregating they might early sense the possibility of disorder. Even a protest from pedestrians who were annoyed by the defendants' conduct might be a significant element in determining whether persistence in such conduct was wrongful.[112]

This assertion is dubious law, both on the facts of this case and on principle. The Supreme Court, had it taken the case, could have involved itself in an independent examination of the whole record,[113] and, where the evidence of actual obstruction or disorder was nonexistent, it might well have been particularly reluctant to sanction police orders premised on anticipated trouble. True, the Court has never said that the police cannot act in anticipation, and, in *Feiner,* Chief Justice Vinson explicitly said that the police are not powerless to prevent a breach of the peace. But the anticipated breach in *Feiner* was a riot, not simple obstruction of traffic. Moreover, in cases subsequent to *Feiner,* such as *Edwards* and *Cox,* the Court has shown marked hostility to state claims that the police acted to prevent trouble. Justice Stewart, in *Edwards,* emphasized that "police protection at the scene was at all times sufficient to meet any foreseeable possibility of disorder."[114] In *Cox,* Justice Goldberg, also unhappy with the presence of a hostile crowd, rejected the state's argument that the breach of peace convictions should be sustained because of police fears that violence was about to erupt: "[The] evidence showed no more than that the opinions which [the students] were peaceably expressing were sufficiently opposed to the views of the majority of

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[111] *Id.* at 620, 265 N.Y.S.2d at 850.

[112] *Id.* at 624, 265 N.Y.S.2d at 853-54.

[113] *See* Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

[114] Edwards v. South Carolina, 372 U.S. 229, 232-33 (1963).

the community to attract a crowd and necessitate police protection."[115] Although both Justices Stewart and Goldberg were preoccupied with the hostile crowd problem, Justice Stewart recognized that anticipated disorder might include disruption of pedestrian and traffic movement. Here too, still speaking in *Edwards,* he saw no justification for terminating the demonstration: "Although vehicular traffic at a nearby street intersection was slowed down somewhat, an officer was dispatched to keep traffic moving. There were a number of bystanders on the public sidewalks adjacent to the State House grounds, but they all moved on when asked to do so, and there was no impediment of pedestrian traffic."[116] In effect, Justice Stewart, though he speaks obliquely, argues that the police, finding a conflict between the demonstration and other street uses, should have moved to reconcile these uses. The petitioners, in their brief to the Supreme Court, relied on this approach to defend the lawfulness of their assembly:

> Even if some demonstrators did overflow the Duffy Square area itself [a fact the petitioners deny] the order to disperse was nevertheless unjustifiable. For if the police had really been concerned with such inconsequential interference with traffic that could have been averted by ordering a slight narrowing of the gathering — and that was not done. *Cf. Edwards.*[117]

Similar arguments for accommodation were made by Justices Black and Douglas in their dissenting opinions in *Feiner* and *Adderley.* These arguments adopt, in reality, the approach of the Philadelphia Civil Disobedience Unit which, with its area restriction, sought a viable accommodation of uses. If the Supreme Court had adopted petitioners' position, it would, in effect, have sanctioned area restrictions, at least where those restrictions were needed to achieve accommodation.

The argument for accommodation, however, assumes that these demonstrations have a claim, with pedestrians and traffic, to equal use of public open spaces — a claim that is still uncertain. The majority of the New York court might have confronted this issue in dealing with subdivision three of the New York disorderly conduct statute, which makes it a crime to "congregate with others on a public street and refuse to move on when ordered by the police."[118] Although this statute, unlike the Louisiana obstructing public passages statute, requires an intent to breach the peace, or circumstances that threaten breach, it does pose a similarly broad challenge to right

[115] Cox v. Louisiana, 379 U.S. 536, 551 (1963).

[116] 372 U.S. at 232.

[117] Brief for Petitioners at 16, Turner v. New York, *cert. granted,* 385 U.S. 917, *writ dismissed, mem.,* 87 S. Ct. 1417 (1967).

[118] N.Y. PEN. LAW § 722 (3).

of assembly. Groups will now be "entirely at the mercy of any police officer."[119] The New York court, however, like the Supreme Court in *Cox,* prefers not to analyze the significance of these demonstrations that now strain familiar doctrines of free speech. Rather, in an intriguing use of Supreme Court precedent, the New York court finds that subdivision three is not unconstitutional on its face, and that there is no hint of discriminatory enforcement.

Edwards offers the first point of analysis, and the New York court quickly distinguishes it:

> [T]he thrust of the Court's holding, under facts markedly dissimilar from those with which we are confronted, was to vitiate a statute which was aimed at and employed for the purpose of inhibiting, by means of criminal sanction, "the peaceful expression of unpopular views." We have no such case here. There is no claim, nor could there be, that either the statute here involved or the police action taken was meant to restrict the expression of views, popular or unpopular.[120]

There was, in fact, such a claim, and the petitioners continued to press it in their brief to the Court: "One cannot read the record herein without reaching the conclusion that the police order to disperse, the arrests, and the prosecution were all motivated by hostility to the unpopular views expressed at the meeting."[121] The New York court simply disagrees, finding it inconceivable that New York police could be so motivated. Southern police, however, facing Negroes, do act with malice — or so the New York court implies. *Edwards* does permit this interpretation, particularly when Justice Stewart writes that "[w]e do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute . . . ."[122] The suggestion of vindicative enforcement is strong. Justice Black himself, in *Adderley,* said *Edwards* was premised solely on the vagueness of South Carolina's breach of peace statute — a holding that looks to the possibility of administrative abuse. But Justice Stewart also focused on the facts in *Edwards*, writing that the demonstrators were "convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police actions."[123] He strongly intimates that this conduct, absent a showing that it violated some narrowly drawn statute, could never be punished by the state, principally because "[t]he circumstances in this case reflect an exercise of these basic constitutional rights [speech, assembly, and

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[119] Brief for Petitioners, *supra* note 117, at 15.

[120] 48 Misc. 2d 611, 626, 265 N.Y.S.2d 841, 856.

[121] Brief for Petitioners, *supra* note 117, at 15.

[122] 372 U.S. at 236.

[123] *Id.* at 237.

petition] in their most pristine and classic form."[124] But Justice Stewart never assessed the implications of this "pristine and classic form," contenting himself with a conventional free speech analysis that wholly ignored the basic question of a constitutional right to use public open spaces as a forum for protest. The New York court, understandably, does no more.

Feiner is the next stop, and the New York court uses the case joyfully. It involved the same disorderly conduct statute challenged in this case. It involved claims of police censorship. But Chief Justice Vinson, writing for a majority that was impressed by the findings of the trial court, found the police action commendable. The New York court quotes him at length:

> *"The officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and . . . there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions.* Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered."[125]

But *Feiner,* on any honest view, is simply irrelevant. The trial court had found an incipient riot, deliberately stirred by the speaker. The Supreme Court accepted that finding, and, in that extreme situation, permitted the police to silence the speaker. At Duffy Square there was, at most, the danger of traffic obstruction. Unfortunately, however, the Supreme Court, in *Feiner,* did refer to disruptions of pedestrian and vehicular traffic, just as it referred to threats of violence against the speaker. But both these elements are distinct from the fundamental concern of the Court — the speaker who incites to riot. Yet, by mindlessly including such elements in its recital of important facts, the Supreme Court suggested the propriety of police termination of assemblies far less volatile than the one in *Feiner.* The New York court accepted that suggestion.

Finally, the court turns to *Cox,* which gives it little trouble. Noting the similarity between Louisiana's breach of peace statute, declared unconstitutionally vague, and subdivision three of the New York disorderly conduct statute, the court emphasizes that the Louisiana statute was found unconstitutional as authoritatively interpreted. Breach of peace, said the Louisiana Supreme Court, meant "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." The Supreme Court objected — the definition allowed punishment for peacefully expressing unpopular views. In New York, however, breach of peace is defined as a "disturbance of public order by any act of violence, or by any act likely to produce

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[124] *Id.* at 235.

[125] 48 Misc. 2d at 627, 265 N.Y.S.2d at 857.

violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community."[126] The New York court finds this definition far more specific, and thus outside the ban of *Cox*. Similarly, when the court turns to the facts of the case, it also distinguishes *Cox*: "Clearly, the application of subdivision 3 to the convictions here involved was not an attempt to suppress unpopular views, but was aimed solely at the maintenance of order and the avoidance of obstruction to vehicular and pedestrian traffic."[127] Again, as in *Edwards,* the New York court interprets a demonstration case as a slap at Southern law enforcement. Again, the Supreme Court, when it analyzed the conduct in *Cox,* invited this interpretation. Although it praised the controlled behavior of the demonstrators, the Court issued stern warnings, couched in the speech, speech-plus jargon, that the demonstrators were involved in conduct that could not be granted the same protection as pure speech. In other settings, less suspicious than the one in Baton Rouge, that conduct might forego all protection — or so the opinion implied. The New York court was guided by the implication.

CONCLUSION

The New York court's opinion in *Turner* was no surprise, despite the cries of the lone dissenter. He found wisdom in *Cantwell*:

> Only "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears," may the State interfere with a demonstration. . . . No such conditions existed during the instant demonstration.[128]

This assessment of the demonstration rings true, but the analysis is no more satisfactory than the majority's. Clear and present danger is an unworkable test, derived from free speech cases. Interference with traffic is a puny value. The majority, though it never mentions the clear and present danger test, could easily have used it to sustain the convictions. This fact is symptomatic of the law throughout this area.

The Supreme Court, beginning with *Cantwell,* has created precedents, heavily factual in their holdings, flawed by untenable distinctions, that can be used, in any situation, to justify any result. Such ambivalence, of course, is not peculiar to this area of the law. And Justice Frankfurter, concurring in *Feiner,* is surely right when he warns that "this court can only hope to set limits and point the way."[129] But ambivalence over First Amendment rights is peculiarly

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[126] *Id.* at 620, 265 N.Y.S.2d at 849.

[127] *Id.* at 629, 265 N.Y.S.2d at 858.

[128] *Id.* at 631, 265 N.Y.S.2d at 860-61 (dissenting opinion).

[129] Niemotko v. Maryland, 340 U.S. 268, 275 (1951) (Frankfurter, J., concurring in *Feiner* and companion cases).

dangerous, and the Court, confronted with new techniques of protest, has not even begun to "point the way." Until the Court frees itself of the speech-plus analysis, and recognizes that demonstrations at Independence Hall and Duffy Square are modern forms of public assembly, entitled to generous use of public open spaces, these dramatic new forms of protest will often be suppressed by innately hostile police who act, with ludicrous regularity, to preserve the flow of traffic or protect a rigid order. These officials must be told that cars and pedestrians are not sacred; that public disorder is not intolerable; that public assembly, in modern dress, embodies values that must be guarded. Such pronouncements, admittedly, would mark only the beginning of sophistication. There would remain difficult problems of reconciliation, resolved, hopefully, at the local level, through permit systems and, as in Philadelphia, skilled police conduct. But reconciliation efforts will rarely come, as Duffy Square reveals, until the Court, with its moral force, gives these demonstrations proper status. Justice Douglas, in *Adderley,* has already acted. His brothers, faced with *Turner,* could have shared this wisdom.

HABEAS CORPUS—ITS PAST, PRESENT AND POSSIBLE WORLD-WIDE FUTURE

BY LEONARD V. B. SUTTON*

The writ of habeas corpus has long been recognized in the Anglo-American legal systems as the appropriate procedure to use to challenge an individual's detention and thus to protect his right to freedom from arbitrary arrest. Justice Sutton outlines the history of the development of the writ of habeas corpus and its usage today in the United States of America. Against this background he poses the present-day need for habeas corpus procedures at the international level.

I. GENERAL HISTORY OF THE WRIT UP TO ITS CONSTITUTIONAL OR STATUTORY ADOPTION IN THE UNITED STATES OF AMERICA

THE WRIT of habeas corpus as used today in the United States of America is a civil remedy commanding that a person restrained be brought before a civil court for a determination of the legality of his detention.[1] Historically, however, under the English common law system, upon which the American system is based, there were a number of different types of habeas corpus writs, each commanding that a person restrained be brought before a court or public official for a specified purpose.[2] For example, the ancient writ of *habeas corpus ad deliberandum et recipiendum,* which ordered a prisoner to be removed to the jurisdiction in which an alleged offense had been committed,[3] is perhaps similar to the present procedures of extradition in use in the various American states. The ancient writ of *habeas corpus ad prosequendum* was used for the same purpose.[4] The old writs of *habeas corpus ad faciendum et recipiendum* and *habeas corpus cum causa* commanded that a prisoner be removed from an inferior court to a superior court.[5] Other early writs included *habeas corpus ad satisfaciendum,* which was used in order to remove a prisoner from an inferior court to a superior court in order to execute on a judgment gained in the inferior court,[6] and the writ of

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[1] R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 129 (2d ed. 1876).

[2] *Id.*

[3] BLACK'S LAW DICTIONARY 837 (4th ed. 1951).

[4] 39 C.J.S. *Habeas Corpus* § 1 n.2 (1944).

[5] BLACK'S LAW DICTIONARY 837, 838 (4th ed. 1951).

[6] *Id.* at 837.

habeas corpus ad testificandum which commanded that a witness in custody appear in court for the purpose of giving testimony.[7] The writ of *habeas corpus ad subjiciendum,* the source of our present procedures, commanded that a prisoner be brought before a public official for the purpose of determining the legality of his detention.[8] This article is concerned with the development of this last type of writ.

The principle of habeas corpus, though often thought of as of Anglo-Saxon origin, can be traced in other legal systems as well, having arisen independently to meet a widespread human need for justice and freedom. An example of this was the process of *manifestation* which in Spanish law paralleled the early writ of English habeas corpus.[9] The former, though, was much more effective at the time and was considered unequaled as an instance of judicial firmness and integrity.[10] Still earlier, the Roman edicts of *quem liberum hominem dolo malo retines, exhibeas* and *de libero homine exhibendo* were striking parallels to the early writ of Anglo-Saxon habeas corpus.[11] These edicts allowed freemen who were allegedly restrained improperly to apply to a praetor for an interdict so that they could be liberated.[12] As a prerequisite however, it had to be clearly shown that the prisoner was a freeman, since his status was not open to question in the proceeding.[13]

The first written evidence of the use of the principle of habeas corpus in England appeared during the reign of Henry II, 1154-1189, in the form of a writ called *de odio et atia,* which was used to liberate persons unjustly imprisoned.[14] Other writs which secured personal property and liberty, for example, the writs of *de homine replegiando, de manucaptione capienda* and of *mainprize,*[15] appeared at about the same time. Predictably these gradually became little used because they were of limited application and were too complex.[16]

The first royal recognition of the right embodied in the principle of habeas corpus was the signing of the Magna Charta on June 15, 1215.[17] The development of the law in this field, however,

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[7] 97 C.J.S. *Witnesses* § 30 (1957).

[8] J. SCOTT & C. ROE, THE LAW OF HABEAS CORPUS 9 (1923).

[9] For an excellent article on the history of habeas corpus in the Spanish concept and its modified current use in Puerto Rico, see Amadeo, *El Habeas Corpus En Puerto Rico,* 17 REVISTA JURIDICA 1 (1947).

[10] R. HURD, *supra* note 1, at 131.

[11] W. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 2 (2d ed. 1893).

[12] R. HURD, *supra* note 1, at 131.

[13] W. CHURCH, *supra* note 11, at 3.

[14] *Id.* at 4.

[15] 39 C.J.S. *Habeas Corpus* § 1 (1944).

[16] R. HURD, *supra* note 1, at 130.

[17] F. FERRIS, THE LAW OF EXTRAORDINARY LEGAL REMEDIES 22 (1926).

from that time until the time of Henry VI, 1422-1461, remains somewhat obscure.

In any event, during the reign of Henry VI a remedy known as *corpus cum causa* made its frequent appearance. This writ was closer than *de odio et atia* in form and effect to the later writ of habeas corpus and was used primarily for relief from unjust private detention.[18] Apparently it was not until the reign of Henry VII, 1485-1509, that the remedy was used against the crown.[19] By the time of the reign of Charles I, 1625-1649, the process had become an admitted constitutional remedy and was referred to as a writ of habeas corpus.[20] This line of development led to the passage of the English Habeas Corpus Act on May 26, 1679.[21]

Prior to the passage of the Habeas Corpus Act in England, the power to issue the writs had been exercised by the Courts of Chancery, King's Bench and Common Pleas, and by the Exchequer in a case of privilege.[22] The right, once firmly established in English law, was, unfortunately, greatly abused, and the Act, when finally passed, was aimed not at securing this right to the people, but at eliminating the flagrant abuses of the right by the government and by crown lawyers.[23] The Act itself, 31 Car. II, c. 2, passed the House of Commons as early as 1674[24] but did not get approval from the House of Lords until 1679 and then only by dubious means. It is reported that at least one assenting member apparently managed to be counted more than once with the final vote of the 107 member house being 57 in favor of passage and 55 against.[25]

The Act of 1679 authorized all four of the above mentioned courts in term time to grant the writ of habeas corpus and, upon proper application, also authorized its granting in vacation time by the Lord Chancellor, the Lord Keeper, any of His Majesty's Justices, and the Barons of the Exchequer of the degree of the coif.[26] The Act granted jurisdiction only in cases of imprisonment for "criminal or supposed criminal matters."[27] It was later supplemented by the Statute of 56 Geo. III, c. 100, in 1816, which gave similar jurisdiction in other than criminal matters.[28] An Act in 1862 allowed courts in

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[18] W. CHURCH, *supra* note 11, at 4.
[19] R. HURD, *supra* note 1, at 131.
[20] W. CHURCH, *supra* note 11, at 4.
[21] *Id.* at 21.
[22] R. HURD, *supra* note 1, at 132.
[23] W. CHURCH, *supra* note 11, at 25.
[24] *Id.* at 16.
[25] *Id.* at 22.
[26] R. HURD, *supra* note 1, at 133.
[27] *Id., quoting from* 31 Car. II, c. 2.
[28] *Id.* at 133.

the colonies and dominions to process writs in their jurisdictions without interference from the English courts, if they could insure the execution of the writ.[29]

The first recorded application for the writ of habeas corpus in the North American colonies was denied in 1689 in Massachusetts. In 1692 the Assembly of Massachusetts passed an act specifically conferring upon the courts the power to grant the writ, but the enactment was disallowed by Lord Bellamont in 1695.[30] A subsequent application in 1706 was also refused, but there was no indication that the request was considered unusual at the time.[31] South Carolina, in the 1690's, also passed an act enabling magistrates and judges to put in force the Statute of 31 Car. II, c. 2.[32] In most other colonies, though no specific action was taken, the people apparently assumed that the right to habeas corpus extended to them as there were instances of application for it in a number of colonies.[33] And, the denial, on application to the British Parliament, of the authority to issue writs of habeas corpus in the Province of Quebec in 1774 became an additional ground for complaint at the first Continental Congress in that year, as the other colonies felt that the right, although severely abused at the time, would be flatly denied them as well.[34]

Though no provision regarding the right to habeas corpus was made in the American Articles of Confederation, the United States Constitution, when adopted in 1787, specifically mentioned the writ of habeas corpus. The reference in the American Constitution assumes the existence of the right to habeas corpus and preserves it although it makes no jurisdictional grants.[35] Actual implementation of the writ came in the Judiciary Act of September 24, 1789, section 14 of which granted jurisdiction to issue the writ to the federal Supreme Court, the federal circuit courts and the federal district courts.[36] All of the American states have recognized the right to habeas corpus, some by constitutional provision and others simply by statutory enactments. Thus, though this was originally a common law writ, it has become largely either constitutional or statutory in the United States.[37]

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[29] *Id.* at 133 n.1, *referring to* Statute of 25 Vict., c. 20.

[30] W. CHURCH, *supra* note 11, at 36.

[31] *Id.* at 35.

[32] *Id.* at 37.

[33] *Id.* at 39.

[34] *Id.*

[35] *Id.* at 40.

[36] R. HURD, *supra* note 1, at 134.

[37] 39 C.J.S. *Habeas Corpus* § 3 (1944).

II. SUBSEQUENT DEVELOPMENT OF THE WRIT IN THE UNITED STATES OF AMERICA

The right to a writ of habeas corpus has not remained intact throughout the history of the United States. The Federal Constitution provides that the privilege may not be suspended "unless when, in Cases of Rebellion or Invasion, the public Safety may require it."[38] On April 27, 1861, President Lincoln authorized General Scott to suspend the writ should it become necessary for the public safety during the Civil War.[39] At that time there was no express authority placing the suspension of the writ among the powers of the President. In 1863, however, such a statute was passed.

The United States Supreme Court nevertheless in 1866, during the time in which the writ was suspended, did issue a writ of habeas corpus in *Ex parte Milligan,* stating:

> The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.[40]

The court then went on to say that the suspension of the privilege of the writ ceases when the rebellion or other public emergency ceases, and the prisoner may be released, if in fact his claim has merit, when the suspension terminates.[41]

The writ of habeas corpus today is used in both federal and state courts in the United States for numerous purposes both civil and criminal. All uses involve a determination of the legality of a detention. For example, these run the gauntlet from asserted unconstitutional restraints of various types[42] to attacks on the legal existence of the court itself.[43] Generally the writ is used when it is alleged that due process of law has been denied a petitioner.

In recent years, many United States Supreme Court cases have involved the use of the writ of habeas corpus to attack various procedural defects in criminal trials. Some of the denials of fundamental fairness currently held assertable by means of the writ are:

(1) Denial of the right to counsel at trial;[44]

(2) Admitting as evidence a confession involuntarily obtained;[45]

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[38] U.S. CONST. art. 1, § 9 (2).

[39] Kutner, *World Habeas Corpus for International Man: A Credo for International Due Process of Law,* 36 U. DET. L.J. 235, 253 n.61 (1959).

[40] 71 U.S. (4 Wall.) 2, 130-31 (1866).

[41] Kutner & Carl, *An International Writ of Habeas Corpus: Protection of Personal Liberty in a World of Diverse Systems of Public Order,* 22 U. PITT. L. REV. 469, 507 n.251 (1961).

[42] *Ex parte* Novotny, 88 F.2d 72 (7th Cir. 1937); United States v. Baird, 85 F. 633 (D.C.N.J. 1897); *Ex parte* Martinez, 56 Cal. App. 2d 473, 132 P.2d 901 (1942).

[43] *Ex parte* Pitts, 35 Fla. 149, 17 So. 76 (1895).

[44] Gideon v. Wainwright, 372 U.S. 335 (1963).

[45] Jackson v. Denno, 378 U.S. 368 (1964); Fay v. Noia, 372 U.S. 391 (1963).

(3) Admitting evidence obtained as a result of an illegal search and seizure;[46]

(4) Denial of the right to counsel at critical points in the proceedings;[47]

(5) Denial of counsel during interrogation by the police;[48]

(6) Pre-trial publicity prejudicial to the defendant;[49]

(7) Denial of the right against self-incrimination;[50]

(8) Denial of the right to counsel for prosecution of appeal.[51]

Both historically and currently it is apparent, as mentioned earlier, that the need for and development of the writ of habeas corpus arose because of mankind's innate sense of justice and the need of organized governmental structures to recognize human rights, dignity and freedom. The process developed basically to insure due process of law in a civilized society. The latter implies, of course, a public hearing or public trial with a recognized form of judgment,[52] thus securing an individual and his property from the arbitrary exercise of the powers of government, unrestrained by established principles of law, and assuring to him fundamental rights and distributive justice.

III. The Movement Toward a World Habeas Corpus

The movement toward international recognition of the remedy of habeas corpus to protect fundamental human rights has gained considerable momentum in the past few decades. It has been said that this development is based primarily upon divine law, an international theory of due process, and certain individual rights inherent in natural law.[53] Whatever its origin, and admittedly it has an excellent historical pedigree, in 1928 the Permanent Court of International Justice held that rights could be secured to individuals through treaties. Based upon that ruling, a number of treaties have come into effect which do just that. One example is the Hungarian Peace Treaty of 1947.[54]

Apparently formal protection, on an international scale, of what today are called "human rights" was first provided for in the United

[46] Mapp v. Ohio, 367 U.S. 643 (1961).

[47] White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).

[48] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

[49] Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963).

[50] Malloy v. Hogan, 378 U.S. 1 (1964).

[51] Douglas v. California, 372 U.S. 353 (1963).

[52] In this connection see La Plata River & Cherry Creek Ditch Co. v. Hinderlider, 95 Colo. 128, 25 P.2d 187 (1933).

[53] Kutner, *supra* note 39, at 242.

[54] Kutner & Carl, *supra* note 41, at 536.

Nations Charter. Article 55 pledges signatory nations to a universal respect for human rights and fundamental freedoms.[55] Article 56, in turn, pledges members to take positive action in observance of the purposes and aims of Article 55.[56] Many of these principles, however, are still in the process of being debated since there does not seem to be universal agreement by member nations on how to implement the Charter provisions as expressed in the Universal Declaration of Human Rights and Fundamental Freedoms.[57] This declaration was proposed by the Commission of Human Rights and adopted by the General Assembly on December 10, 1948.[58]

As far as habeas corpus is concerned, Article 9 of the Universal Declaration contains a provision to the effect that "[n]o one shall be subject to arbitrary arrest, detention or exile."[59] Neither this declaration, however, which does not have the effect of a treaty,[60] nor the United Nations Charter contain any provision for implementation of the right to be free from arbitrary arrest.

The vision of an international writ of habeas corpus has been propounded recently by legal theorists. Mr. Luis Kutner, the American leader in this field, has made the following comments in this connection:

> The concept of an international writ of habeas corpus came into existence as a concrete proposal after the reading of *Mein Kampf* in 1930 and a view of the frightening scene of 10,000 arms raised in Roman salute to the raucous voice of a demented, self-proclaimed redeemer of the German national honor. Hitler's blueprint for arbitrary arrest, detention, and human slaughter was made available for all the world to see.[61]

The ideal has caught the imagination of many persons in many lands, particularly in the United States, where numerous authors, lecturers, congressmen, diplomats and legal theorists urged, during the 1950's, that the right to issue writs of habeas corpus should be vested in a

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[55] U.N. CHARTER art. 55 (c). *See generally* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 33 (1950).

[56] Kutner, *World Habeas Corpus: A Legal Absolute for Survival,* 39 U. DET. L.J. 279, 282 (1962).

[57] See Report of the American Bar Association's Standing Committee on Peace and Law Through United Nations, May 1967, for its comments and recommendations on four of the proposed conventions already submitted to the United States Senate (Genocide, Supplementary Slavery, Abolition of Forced Labor, and Political Rights of Women); and see its comments on other conventions not yet submitted to the Senate for its advice and consent. As far as is known no convention has yet been proposed by an official United Nations Commission on a world-wide habeas corpus system.

[58] Kutner, *A Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights,* 28 TUL. L. REV. 417, 420 (1954).

[59] Kutner, *supra* note 56, at 296. For an example of a petition brought under this provision, see Petition for Writ of World Habeas Corpus for Moise Tshombe filed in the United Nations General Assembly, Economic and Social Council, Human Rights Commission, July 1967.

[60] Kutner, *supra* note 58, at 420.

[61] Kutner, *supra* note 56, at 288.

world court.[62] During those years a resolution was proposed in the United States House of Representatives to the effect that the United States sponsor a treaty proposing that an international court be empowered to issue the writ of habeas corpus upon proper application directed to countries detaining their own nationals. Opposition to such a stand, by the United States Department of State, among others, was based upon the obvious loss of sovereignty by each signatory nation if such a step were to be taken.[63]

Some other nations, nevertheless, have not been as reticent as the United States and have evidently believed the surrender of such a parcel of sovereign power would be worthwhile in the rapidly changing world of today. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms, which became effective in September 1953, provided for regional implementation of a remedy for arbitrary detention.[64] Also, the European Court of Human Rights came into being in 1959 as a result of the European Convention, and in 1960 that court began handling cases of a nature that would be treated by the type of International Courts of Habeas Corpus proposed by Mr. Kutner.[65] The possible creation of the latter type of court has now become the subject of considerable world-wide discussion. Its advent is believed by many authorities to be the proper beginning of a solution as to how the basic human right of mankind to individual freedom can best be recognized and protected. For that reason the general concept and operation of such a court system will next be discussed.

Kutner conceives of the creation by treaty of International Courts of Habeas Corpus. Such courts would be created in definitive geographical regions, each comprised of a number of signatory nations. Each regional court would be staffed by regional world attorneys-general, appointed to prosecute and resist applications, as well as by amici curiae who would be regionally appointed, to aid in the prosecution of petitions.[66] The court itself would consist of not less than two jurists from each signatory country, each serving a region which does not include his own country. Each region would select its own chief justice from among the member jurists.[67] The court itself would operate on general principles of fundamental fairness, and on natural law rather than legal principles drawn from any one or more member nations.[68] Apparently, inherent in the legal con-

[62] *Id.*

[63] *Id.* at 289.

[64] Kutner, *supra* note 58, at 421; Kutner & Carl, *supra* note 41, at 538.

[65] Kutner, *supra* note 56, at 306.

[66] *Id.* at 319.

[67] *Id.* at 322.

[68] Kutner, *supra* note 39, at 243.

cepts to be employed, however, would be those discussed earlier herein relating to due process of law and the right of an individual to be free from arbitrary governmental arrest and restraint.

One can foresee many practical difficulties in trying to establish such a new judicial system in this era of great social, economic and political upheaval. For example, it is essential in the first instance, to gain general recognition of the right of an individual, as opposed to that of the state, to present his case before an international tribunal.[69] If World Habeas Corpus is to succeed it is obvious that the detained or incarcerated individual, or someone on his behalf, must be permitted to file and prosecute the petition.[70] As previously noted, a good start in altering thinking along the necessary lines has been made by the creation of the European Court of Human Rights. Apparently, a second obstacle is the reluctance on the part of some nations, including the United States,[71] to agree to any loss of individual sovereignty which is, to some extent, implicit in adhering to the jurisdiction of any international judicial body. Another serious stumbling block is that there does not appear to be at this time any way to enforce the mandates of such courts.[72] In this connection, it has been suggested that sanctions are unnecessary. Proponents of this belief cite as examples the general success of the few international tribunals which have functioned heretofore, as well as the success of international arbitral boards. They also refer to the European Common Market operations to support the proposition that signatory nations will respect and adhere to the judgments of an international judicial body.[73] This position, while it may be overly optimistic, may be somewhat supported by the fact that there are very

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[69] *See* H. LAUTERPACHT, *supra* note 55, at 51. *See also* Kutner, *supra* note 58, at 423-30.

[70] Procedural machinery must be developed in those states in which there is no guarantee that the right to habeas corpus will be more than a paper right. For a brief discussion of the internal problem involved and the present procedural guarantees available in the Communist states, see Kutner & Carl, *supra* note 41, at 516-35. Sanctions should also be imposed to enforce the guaranteed right. *See* Kutner, *supra* note 56, at 316 n.95.

[71] Kutner, *supra* note 56, at 290. An example of this is the United States Senate's insistence on the Connally Reservation to the United States declaration of adherence to the compulsory jurisdiction of the International Court of Justice in 1946. The Connally Amendment consists of only the six italicized words which appear at the end of the following quotation from the United States declaration of adherence to the jurisdiction of the World Court: "This declaration shall not apply to . . . (b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States *as determined by the United States*." Declaration by the President, Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598 (emphasis added). The net effect of this amendment is not only to give the United States what amounts to a veto over which cases it will permit to come before that court but also, under the doctrine of reciprocity, a state sued by the United States has the same right of determination. If it is assumed that any Regional World Court joined by the United States of America would have a similar restriction placed on the declaration of adherence, then the "veto" power could be exercised in this context as well.

[72] Kutner, *supra* note 56, at 292.

[73] *Id.* at 295.

few recorded instances of non-compliance with the judgments of the present International Court of Justice.[74]

History teaches us that the progress of the human race has always been one of struggle to achieve a better way of life, more perfect justice and a more peaceful existence. The writ of habeas corpus has been one of the most potent weapons yet devised in man's attempt to follow paths to these fundamental and rightful goals. Mankind will somehow, some way, and hopefully very soon, use this ancient, revered and versatile remedy to serve his need for human freedom on an international basis. Surely, Regional International Courts of Habeas Corpus are within reach. Once created and obeyed, they will permit those who in good faith adhere to the precepts of the United Nations Charter, to see to it that at least in their countries there is protection against arbitrary arrest and unlawful detention. Hopefully, this safeguard can gradually be extended to all men everywhere.

[74] *Id.* at 325.

ANTITRUST AND THE LAY LAWYER

BY BRUCE DUCKER*

It is often said that the merit of a good attorney is his ability to spot the issues in a legal problem. Realizing that a substantial number of attorneys know very little about antitrust and trade regulation laws, Mr. Ducker discusses those problems which are most frequently encountered in counseling small business. The emphasis is on federal law, but Colorado regulations are discussed when applicable. After placing the regulation of business in its historical setting, Mr. Ducker discusses price controls: price fixing, sales below cost, price maintenance, and refusal to deal. Attention is then directed to the major problems involved in exclusivity, whether it be in market, sales, or purchases. The author first discusses exclusive dealing arrangements in the vertical chain of supply, followed by a consideration of the legal consequences of requirements contracts and tying arrangements. Exclusivity in the form of exclusive franchises is also examined. This is followed by a discussion of trade associations, their value, and the steps which must be taken to insure that they do not contravene applicable laws. Mr. Ducker concludes his article by discussing the civil remedies available to a client who has been wronged by the illegal actions of another. In particular, the treble damage action is analyzed, with special emphasis on the elements of proof.

INTRODUCTION

AS THE title of this article suggests, many lawyers view the body of antitrust and trade regulation laws as something both remote and esoteric. It is true that few general practitioners in Colorado are called upon to merge a soap company with a diversified food manufacturer, and even fewer are engaged to divest the two. Nevertheless, most businessmen come in frequent contact with antitrust problems. This article would attempt to make their lawyers aware of that contact.

The reader should be cautioned that this article will be of little interest or utility to those who practice regularly in the field. It will provide answers to only the simplest problems, and even those answers should be supported by independent research. For the more complex situations, this article may be of some help as a starting point for investigation. Of necessity, the attempt to cover a substantial body of law in one article has resulted in some oversimplification. The law of refusal to deal, tying agreements, and exclusive dealings are not nearly as settled as may appear. In other words, the sole strength of this type of survey — conciseness — also has the inherent weaknesses of superficiality and oversimplification.

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I. The Historical Setting

Before inquiring into the laws themselves, some attention should be given to their historical and economic origins. What are the antitrust laws, and how did they come into being? It is fair to say that these controls were the result of dangerous abuses of the free enterprise system.

The Industrial Revolution produced both giant industrialists and a creed they held inviolable. Those who had risen to the top of the competitive heap in the first half of the nineteenth century owed their success to the resources of this country and to the climate of freedom it had afforded them. Between 1800 and 1850, great fortunes had been accumulated, fortunes which bestowed considerable power upon their holders. These men, inventive and aggressive, found in the structure of the contemporaneous economy an opportunity for even greater power: pools or agreements were formed within an industry to avoid the rigors of competition. For instance, several railroads would agree to divide the market area and thus eliminate rate wars.

The corporate extension of this scheme was the trust. By acquisition and merger, virtually an entire industry could be forged together under one directorship. The first great trust, Standard Oil Company of Ohio, emerged in 1882. Within five years similar combinations had been wrought in sugar, whisky and cotton-oil. The implications to the health of the national economy were dire and evident: free enterprise had produced an octopus which could strangle the parent by monopolistic control. To break the grip of the trusts, Congress in 1890 passed the Sherman Antitrust Act,[1] making illegal the monopolization of trade and combining or conspiring in restraint of trade. The law was not idle for long. Under Theodore Roosevelt, the "trust buster," and William Howard Taft, all major trusts were attacked; in their combined eleven years in the White House, the government instituted some 114 cases.[2] From this litigation the most significant development was the emergence of the "rule of reason,"[3] that is, that only *unreasonable* restraints of trade were illegal.

The Supreme Court's formulation of this rule of reason constituted, in the eyes of many, a threat to the efficacy of the Sherman Act itself. Would not the rule of reason permit continued abuses of monopolistic power, under the shibboleth of reasonable restraint? The nation's uncertainty about Sherman Act application was reflected in the election of 1912, in which remedial legislation became

[1] 15 U.S.C. §§ 1-7 (1964).

[2] E. Kintner, An Antitrust Primer 14 (1964).

[3] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

a part of both parties' platforms. In 1914, Congress passed the Clayton Act[4] and the Federal Trade Commission Act.[5] The former was directed against exclusive dealings and interlocking directorates; the latter outlawed unfair methods of competition. The Clayton Act was significantly amended in 1939 by the Robinson-Patman Act,[6] attempting to restrict discriminatory favors and pricing.

While various other statutes have been enacted, the Sherman Act, the Clayton Act, as amended, and the Federal Trade Commission Act constitute the heart of federal antitrust law. As exercises of the authority of Congress to regulate foreign and interstate commerce, these statutes do not apply to transactions affecting commerce within one state only.[7] When referring to federal laws, the following discussion assumes the requisite interstate contact.

If these contacts do not exist, a transaction must nevertheless conform to certain standards, since a second, independent body of *state* antitrust laws exists. In Colorado, for example, four desultory articles of our statutes relate to fair trade contracts,[8] unfair practices including sales below cost,[9] cigarette sales,[10] and restraints of trade and commerce.[11] Treatment is given below to fair trading and selling below cost; cigarette sales have been omitted entirely. Some mention should also be made of the remaining state provisions.

The Colorado Unfair Practices Act[12] prohibits price discrimi-

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[4] 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1964).

[5] *Id.* §§ 41-58.

[6] *Id.* §§ 13-13b, 21a.

[7] In Swift & Co. v. United States, 196 U.S. 375 (1905), the Supreme Court held that interstate commerce is affected by anything happening in the flow of commerce, even though the events are wholly within one state. As a result, there are few transactions indeed which do not come within the federal antitrust laws.

[8] COLO. REV. STAT. ANN. ch. 55, art. 1 (1963).

[9] *Id.* art. 2.

[10] *Id.* art. 3.

[11] *Id.* art. 4.

[12] *Id.* § 55-2-1(1):

> It shall be unlawful for any person, firm or corporation, doing business in the state of Colorado and engaged in the production, manufacture, distribution or sale of any commodity, or products, or service or output of a service trade, of general use or consumption, or the sale of any merchandise or product by any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities, or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this article.

nation of the same bent outlawed by Robinson-Patman. The state law specifically prohibits secret rebates and refunds,[13] and sales below costs,[14] and provides criminal[15] and treble damage civil[16] remedies for its violation.

Colorado's "little Sherman Act" outlaws, with a bit more specificity than its prototype, the same areas of activity: contracts, combinations, trusts, pools and agreements restraining or intending to restrain trade,[17] as well as conspiracies to enter these alliances.[18] Authority is given the courts to enjoin formation of these combinations[19] and the contracts themselves are voided.[20] Although a civil remedy is provided, damages are restricted to those actually incurred.[21]

The state, then, has afforded an ersatz remedy for the competitor wronged by both discriminatory practices and restraints of trade. But, as is the case with most state antitrust laws, these statutes have gone largely unused. The discriminatory practices section of the Unfair Trade Act, enacted in 1937, has been cited in but eight reported decisions, both state and federal.[22] The "little Sherman Act" has received no mention whatsoever since its 1947 enactment.

The explanation for the atrophy of the latter is obvious: a plaintiff offering basically the same proof in federal court stands to gain thrice what he would in state court. But the Colorado price discrimination statute includes treble damages, and still it is not used. The preference for the federal remedy is, of course, the lawyers' rather than the clients'. It is suggested that the reasons for this preference are practical. Federal judges are more familiar with the statutory intricacies involved. The lawyer may borrow from the welter of existing precedent on Robinson-Patman, as contrasted with the scarcity of interpretation under state laws. Also, cases are

[13] COLO. REV. STAT. ANN. § 55-2-7 (1963).

[14] *Id.* § 55-2-3.

[15] *Id.* § 55-2-14.

[16] *Id.* § 55-2-9.

[17] *Id.* § 55-4-1.

[18] *Id.* § 55-4-2.

[19] *Id.* § 55-4-5.

[20] *Id.* § 55-4-6.

[21] *Id.* § 55-4-8.

[22] United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); United States v. Maryland State Licensed Beverage Ass'n, 138 F. Supp. 685 (D. Md. 1956); Flank Oil Co. v. Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960); City and County of Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919 (1959); Olin Mathieson Chemical Corp. v. Francis, 134 Colo. 160, 301 P.2d 139 (1956); Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P.2d 343 (1950); Old Homestead Bread Co. v. Marx Baking Co., 108 Colo. 375, 117 P.2d 1007 (1941); Dikeou v. Food Distrib. Ass'n, 107 Colo. 38, 108 P.2d 529 (1940). In none of these decisions has an analysis been made of the Act as comprehensive protection against price discrimination.

generally heard more quickly in federal court, a prime consideration for a plaintiff who is facing a protracted fight. Finally, a defendant faced with a private action in federal court is aware that unlimited warfare, with its accompanying discovery, may pique the interest of federal forces, either the Department of Justice or the Federal Trade Commission. By joining battle in federal court, a plaintiff exposes his opponent to a possible rear-guard attack, which is conducive to out-of-court settlement.[23]

Plaintiffs' lawyers nevertheless might consider the state laws as tools for protection, since in certain circumstances they may either afford the only remedy or better suit a particular need. Despite the "flow of commerce" theory which has so expanded interstate commerce, industries still exist which are purely intrastate;[24] the state court, therefore, affords their only forum. Also, the state courts and state legislature would be more familiar with problems endemic, and perhaps peculiar, to the region. Finally, the alternative forum may better suit one whose situation has been precedented by adverse treatment under the federal laws.

So much for apology, history, and premise — what do the laws say? The problems selected for discussion are those most frequently encountered in counseling a small business, with one notable exception — price discrimination under the Robinson-Patman amendments.[25] Problems of pricing and exclusivity are considered, with emphasis on Colorado peculiarities. The section on trade associations reflects the increasing interest by small enterprises in this device for competing more effectively. Finally, some comment is given to the wronged client and his remedy of private action.

II. PRICE CONTROL

A. *Price Fixing*

Pricing, perhaps the most crucial of business decisions, frequently raises intricate antitrust problems. Price fixing is not among them, since the law's treatment of the practice is far from problematical — agreements between competitors which tend to fix prices

[23] It may also help the plaintiff to satisfy his burden of proof. *See* text accompanying note 113 *infra.*

[24] These are more likely the businesses unaware of their rights under antitrust laws and thus vulnerable to predatory practices of others.

[25] Small business counseling in the Robinson-Patman area is the subject of an excellent article by Earl W. Kintner, former chairman of the Federal Trade Commission, appearing in 23 FED. B. J. 309 (1963).

Other less common problems involving the merger provisions of the Clayton Act, unfair methods of competition, the Federal Trade Commission Act, and such specialized legislation as the Automobile Dealers Act and the Bank Merger Act are not within the scope of this article.

are simply illegal.[26] The motives of the parties, the volume of business involved,[27] the effect on the price (whether depressant or stimulant), the reasonableness of the price,[28] the possible ameliorative effects upon competition[29] — all these have been held to be of no consequence. The prohibition applies equally to buyers and to sellers,[30] to the sale of services as well as products,[31] and to all participants in the chain of production and supply. This rule of forbidden activity is the clearest of the "per se" violations. Once price fixing is established, prosecutorial inquiry need proceed no further, and no defense will be effective.[32] The reason for this has been spelled out by the Supreme Court: "The power to fix prices, whether reasonably exercised or not involves power to control the market and to fix arbitrary and unreasonable prices."[33]

B. *Sales Below Cost*

Antitrust issues do not always hinge on the presence of concert among competitors. If the client seeks unilaterally to employ pricing techniques, his actions will be subject to antitrust legislation if anticompetitive in their effect. The Sherman Act does not specifically prohibit sales either at unreasonably low prices or below cost; rather, it proscribes general results — monopolization and restraint of trade.[34]

Whether sales below cost produce these results is a question of fact, turning, for the most part, upon two indices: first, the control of the market exercised by the seller; second, his intent in making the sale.[35] Although seemingly distinct, the two indices are often meshed, for, unfortunately, courts are prone to view the existence of market dominance as indicative of predatory intent. To illustrate, in one case,[36] the defendant managed some of its stores

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[26] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[27] United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956).

[28] United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[29] Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950).

[30] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[31] United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950).

[32] *See, e.g.*, Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956).

[33] United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

[34] 15 U.S.C. §§ 1-7 (1964).

[35] *See, e.g.*, United States v. New York Great Atl. & Pac. Tea Co., 173 F.2d 79 (7th Cir. 1949); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); Hershel California Fruit Products Co. v. Hunt Foods, Inc., 111 F. Supp. 732 (N.D. Cal. 1953). These cases indicate that, under federal law, sales below cost may have justifiable and salutary economic effects, and that it is the *effect* of these sales, not their mere existence, which may make them illegal.

[36] United States v. New York Great Atl. & Pac. Tea Co., 173 F.2d 79 (7th Cir. 1949).

at a gross profit so low as to be under the cost of operations. The scope of its operations was large enough to enable it to spread this apparent loss among its other stores. It could thus exert intense and localized pressure upon certain competitors, pressure so keen as to be adjudicated illegal. Although no specific proof of intent was proffered, the court held that the mere pattern of conduct clearly established an anticompetitive purpose.[37]

Another line of attack on sales below cost is Section 13 of the Robinson-Patman Act, which makes it unlawful for any person to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or of eliminating a competitor.[38] This statute has not been widely utilized because suits for its violations can more easily be sustained under the "monopolization" and "restraint of trade" language of the Sherman Act.

Aside from federal statutes, sales below cost are also subject to state regulation. In Colorado, for example, certain below-cost sales are outlawed by statute. Although the words of the act appear to establish these sales as per se violations,[39] interpretation by the state supreme court has emphasized that the *intent* to injure competitors is an essential element of the prohibited action.[40] The court has correctly noted that to be a constitutional exercise of the state's police power, only those sales which are *intended* to injure the public may be prohibited.[41]

New Jersey has attempted to outlaw the mere sale of goods below cost, regardless of motive, and has seen its law thrown out as unconstitutional in failing to define any public harm or damage to be averted.[42] Public interest, then, is threatened only when below-cost sales are used to prey upon a competitor.

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[37] *Id.* at 88.

[38] 15 U.S.C. § 13 (1964).

[39] COLO. REV. STAT. ANN. § 55-2-3 (1963):

> (1) It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this state, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade for less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in Section 55-2-14 for any such act.

[40] Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P.2d 343 (1950); Miller's Groceteria Co. v. Food Distrib. Ass'n, 107 Colo. 113, 109 P.2d 637 (1941); Dikeou v. Food Distrib. Ass'n, 107 Colo. 38, 108 P.2d 529 (1940).

[41] Perkins v. King Soopers, Inc., 122 Colo. 263, 267, 221 P.2d 343, 345 (1950) (emphasis added).

[42] State v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A.2d 291 (1939).

One last aspect of sales below cost is notable for the Colorado practitioner. The Colorado legislature has defined the illegal purpose involved as that of "injuring competitors *and* destroying competition."[43] Nevertheless, in an imposing line of decisions, the Colorado Supreme Court has treated these two requirements as alternatives.[44] The court has said:

> It is most apparent that proof of a sale of merchandise below cost is not "in and of itself, by virtue of its own force, conclusive" in support of the intent of the seller to thereby injure competitors *or* destroy competition. Such a sale might be made with an intent wholly unrelated to injuring competitors *or* destroying competition.[45]

The construction would substitute a judicial "or" for the legislative "and." The substitution would be logical. As it now reads, the statute is inaccurate and redundant — the destruction of competition necessarily includes the injury of competitors, or at the least, the preclusion of potential competitors. On the other hand, below-cost sales can be imagined which might temporarily injure competitors, by drawing individual product consumption from them, but which would not *destroy* competition in that product. Under the words of the act, these sales would be permissible; under the judicial construction, they would not. While the question thus remains technically open, the legal counselor might best proceed on the assumption that a purpose *either* to injure competitors or to destroy competition will be sufficient at trial.

Not all sales below cost are illegal, for both state and federal laws recognize the possible economic justification for setting a markedly low price. Every retailer would readily agree with this conclusion. A merchant may wish to introduce a new product or open a new store in a particular area and use a low price to offset the entrenchment of the competition. He may find that his competition has legally been able to beat him to the price-cut punch.[46] He may be seeking, by increasing his volume without a commensurate increase in profits, to avail himself of a cost-justified discount. Or perhaps he wishes to employ a loss leader — one product priced

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[43] COLO. REV. STAT. ANN. § 55-2-3(1) (1963) (emphasis added).

[44] Perkins v. King Soopers, Inc., 122 Colo. 263, 221 P.2d 343 (1950); Miller's Groceteria Co. v. Food Distrib. Ass'n 107 Colo. 113, 109 P.2d 637 (1941); Dikeou v. Food Distrib. Ass'n, 107 Colo. 38, 108 P.2d 529 (1940).

[45] Perkins v. King Soopers, Inc., 122 Colo. 263, 268, 221 P.2d 343, 345 (1950) (emphasis added).

[46] The Colorado statute recognizes the good-faith meeting of competition as one of the four exclusions from the act. The others are close-out or seasonal sales, the sale of damaged or deteriorated goods, and sale pursuant to a court order. COLO. REV. STAT. ANN. § 55-2-6 (1963).

low in an effort to attract purchasers for other products.[47] These practices should be, and apparently are, permitted so long as they invigorate the general market place.

C. *Price Maintenance*

Even the most unsophisticated manufacturer will, early in his business career, realize that his profit margin would be protected if he could set the resale price of his product. When he consults his lawyer, he wants to know, not whether, but how he can do this, and what "muscle" he can use to enforce obedience.

A manufacturer, whether in interstate or intrastate commerce, may establish the price at which his product is to be resold if he can place himself within his state's fair trade laws. This situation was made possible by the Miller-Tydings Act[48] and the McGuire Act,[49] federal laws which exempt from existing antitrust application contracts prescribing resale prices so long as those contracts are lawful under state law as applied to intrastate transactions. Thus, fair trade laws place a significant portion of commerce beyond the reach of the price-fixing interdiction of both local and federal antitrust laws. Generally, they establish the legality of a contract relating to the resale of a product whose producer can be identified by his mark, where that product is in open and free competition with similar products.[50] The degree of variance among the states in the substantive treatment of this exemption is remarkably slight, variations being, for example, whether the seller can establish a

[47] The practice of "loss leaders" is common to retailers in every state. This area has been subject to more litigation in California than in any other state. Section 17044 of California's Business and Professions Code flatly prohibits their use, with no provision as to competitive injury. In another section, the Code declares that it is unlawful for any person to sell any product at less than cost for the purpose of injuring competitors or destroying competition. The California courts have found in this latter section a pervading legislative intent, and have therefore incorporated this purpose as a requirement of the "loss leader" prohibition. Wholesale Tobacco Dealers Bureau of Southern California v. National Candy and Tobacco Co., 11 Cal. 2d 634, 82 P.2d 3 (1938); Northern California Food Dealers, Inc. v. Farmers Mkt. of Northern California, Inc., 1956 Trade Cas. ¶ 68,402, (Cal. Super. Ct.); Ellis v. Dallas, 11 Cal. App. 2d 234, 248 P.2d 63 (Dist. Ct. App. 1952).

[48] 50 Stat. 693 (1937), *amending* 15 U.S.C. § 1.

[49] 15 U.S.C. § 45(a) (1964).

[50] The Colorado Fair Trade Act is not atypical:

> (a) No contract relating to the sale or resale of a commodity which bears or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:
>
> (b) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller;
>
> (c) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.
>
> COLO. REV. STAT. ANN. § 55-1-1(1) (1963).

minimum or absolute price, or whether the owner of the identifying mark, rather than the producer, may set the price.

The important variation among the laws of these several jurisdictions concerns the "non-signer" clause — that provision of the Fair Trade Act which binds all persons so notified to the price set in the contract between manufacturer and retailer.[51] Of the forty-three states with fair trade legislation, all but two include non-signer provisions.[52] Only seventeen, however, have withstood the challenge of constitutionality.[53]

The Colorado non-signer clause was among the casualties. Having survived two lower court challenges,[54] it came under the scrutiny of the state supreme court in *Olin Mathieson Chemical Corporation v. Francis*.[55]

In that case, a manufacturer of guns and ammunition sought to enforce compliance to the non-signer clause by enjoining one not a party to the contract from undercutting the established price. The court reasoned that the state's police power was the only possible source of authority for the regulation of prices on the open market. Since there was no public interest inherent in the sale of firearms, the legislature may not affix prices to those sales, nor grant another, *i.e.*, the manufacturer, the right to do so. Following this reasoning, the court struck down the non-signer clause as unconstitutional.[56]

It might be mentioned in passing that this opinion fails to come to grips with antitrust and economic principles as we now conceive them. Our economy is not one of free competition, but rather one delicately controlled as to both buyer and seller. The decision of whether to permit, within this economy, transactions binding not only the parties thereto but their competitors as well must be made on the pragmatic needs and weaknesses of the economy itself.[57]

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[51] COLO. REV. STAT. ANN. § 55-1-4 (1963):

> Underselling unfair competition — Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this article, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

[52] Maine and North Dakota, 4 Trade Reg. Rep.

[53] Arizona, California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Dakota, Tennessee, Virginia, and Wisconsin, 2 Trade Reg. Rep. ¶ 6021.

[54] Parker Pen Co. v. Zale, 1956 Trade Cas. ¶ 68,416 (Weld Dist. Ct.).

[55] 134 Colo. 160, 301 P.2d 139 (1956).

[56] *Id.* at 186.

[57] *See* Cooley, *Survey of Pennsylvania Law: Constitutional Law,* 26 U. PITT. L. REV. at 171-79 (1964), for an analysis of the constitutionality of non-signer provisions; Kellog, *Czar in Lambskin?* 1965 WIS. L. REV. 133, for comment on the problems besetting state regulation of economics; Comment, *Resale Price Maintenance,* 78 HARV. L. REV. 1277 (1965), for discussion of a recent British act attempting to eliminate minimum prices for resale.

Fair trading must be distinguished from price fixing. The Fair Trade Act does not authorize a conspiracy to fix prices to the detriment of competition. Rather, the Act concerns only those products in free and open competition with those of the same general class produced and distributed by others. With this in mind, the federal district court has held the Act to be no defense to a charge of concerted attempt to eliminate competition in certain trademarked brands.[58]

In summary, maintenance of resale prices is possible only if one can comply with his state's fair trade laws. Even then, in Colorado the manufacturer has no remedy against a price cutter with whom he has no privity of contract. The manufacturer may decide to refuse to deal with, or supply, the disobedient. If this occurs, various legal issues must be confronted.

D. *Refusal to Deal*

Any discussion of the individual's right to refuse to sell must begin with *United States v. Colgate & Co.*,[59] in which the Supreme Court first established that the Sherman Act does not of itself impinge upon one's freedom to deal with whom he wishes, absent monopolistic purposes. But to naively accept this as guidance is hazardous, for *Colgate* has been clarified and distinguished by nearly fifty years of court treatment in this area.

In reality, one with monopoly power who selectively refuses to deal does so at his peril. The greater his market dominance, the stronger will be the court's presumption of a covert, illegal purpose.[60] Behind the antitrust laws exists, of course, a legislative desire to maintain free access to any sector of commerce for those who seek it. The greater difficulty one has in obtaining supplies, the greater are the obligations of possible suppliers to him. The law will not be satisfied with merely a theoretical opportunity to "shift for oneself"; unless access is open in fact, a dangerous probability exists that an industry is coagulating into oligopoly, with the potential for evolving into a de facto monopoly.[61]

Colgate nominally allows a unilateral, well-intentioned refusal to deal. Here again, action permissive when done by one is pro-

[58] United States v. Colorado Wholesale Wine and Liquor Dealers Ass'n, 47 F. Supp. 160 (D. Colo. 1942).

[59] 250 U.S. 300 (1919).

[60] Banana Distrib., Inc. v. United Fruit Co., 162 F. Supp. 32 (S.D.N.Y. 1958).

[61] Lorain Journal Co. v. United States, 342 U.S. 143 (1951); National Screen Serv. Corp. v. Poster Exch. Inc., 305 F.2d 647 (5th Cir. 1962); Campbell Distrib. Co. v. Joseph Schlitz Brewing Co., 208 F. Supp. 523 (D. Md. 1962). In United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945), the court apologetically notes that, although the manufacturer had legitimately achieved its position as the only producer of linen rugs, its use of that position in refusing to sell was illegal.

hibited when done in coalition with others.[62] Collusive or concerted boycotts are per se violations of the Sherman Act.

Only last year, the Supreme Court examined and found a "classic conspiracy in restraint of trade."[63] In that case, testimony revealed that Chevrolet dealers were supplying cars for resale to Los Angeles discount houses, contrary to the wishes of General Motors. The defendant and three dealer associations, in an attempt to eliminate the practice, prohibited a dealer by contract from moving to or establishing "a new or different location, branch sales office, branch service station, or place of business including any used car lot or location without the prior written approval of Chevrolet."[64] While the argument on appeal centered around the validity of this clause, the Supreme Court saw beyond the explicit agreement to a

> joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. . . . Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act.[65]

What, then, is left of the permissiveness once allowed by *Colgate?* Is it an invisible shield, or is it merely invisible? The current status of *Colgate* may be illustrated by examination of two recent cases involving the oil industry. In one, the Union Oil Company was enjoined from threatening non-renewal of the dealer's lease, where the threat had effectively coerced maintenance of established resale prices.[66] In a similar case, the court of appeals redefined the *Colgate* rule, saying that it

> means no more today than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. It allows each customer to decide independently to observe specified resale prices if induced to do so *solely* by a seller's announced policy. United States v. Parke, Davis & Co., 362 U.S. 29, 43-44. . . . On this summary judgment record, to hold that the defendant's actions do not establish a Sherman Act violation would serve to breathe new life into a doctrine we think fatally drugged by Parke, Davis & Co.[67]

Thus, while the core of *Colgate* still remains intact, all excess has been pared away. The ability to refuse to deal may be exercised freely, so long as it is not exercised in concert or with monopolistic motives. Courts are apparently more sensitive to motives im-

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[62] United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

[63] United States v. General Motors Corp., 384 U.S. 127, 140 (1966).

[64] *Id.* at 130.

[65] *Id.* at 140-45.

[66] Weingartner v. Union Oil Co. of Calif. 1966 Trade Cas. ¶ 71,757 (N.D. Cal. 1965).

[67] Broussard v. Socony Mobil Oil Co., 350 F.2d 346, 350 n. 10 (5th Cir. 1965).

plemented through boycotts, and the combination of competitive zeal with a refusal to deal may be unlawful even though neither element would be so on its own.

III. EXCLUSIVITY IN MARKET, SALES OR PURCHASES

A. *Exclusive Dealings*

Wholesalers have historically been solicited by the manufacturers who supply them to handle certain products to the exclusion of competing products. They, in turn, may seek to require their retail outlets to do the same. On any level of the distributive chain — manufacturer, jobber, dealer — these transactions are subject to the application of Section 3 of the Clayton Act.[68] Under this statute, one cannot sell or lease goods on the condition that the recipient will not use or deal in the commodities of a competitor, if the effect of that sale or lease or the condition itself may substantially lessen competition or tend to create a monopoly. Further, one cannot fix a price for any commodity, or discount from or rebate upon that price, on the condition that the recipient refrain from dealing in the competitor's goods, if his action would tend to have the requisite effect.

Again, the oil companies have litigated the touchstone cases, providing the guidelines for the small businessman. In one case,[69] an integrated producer selling its own brand of gasoline, oils, and lubricants, and a full line of TBA (tires, batteries and accessories) purchased on consignment for resale, adopted the tactic of "full line forcing." The company required its dealers to handle its gasoline exclusively, and to discontinue the advertising of competitive oils and TBA, if they were to keep their dealerships. The dealers were bound by written, as well as tacit, agreements pertaining to the exclusive dealings with the supplying company. The Justice Department challenged this practice and the court had little difficulty in finding the requisite anti-competitive effect in this most vigorous of industries.

A more sophisticated situation was presented to the Supreme

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[68] 15 U.S.C. § 14 (1964):

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

[69] United States v. Sun Oil Co., 176 F. Supp. 715 (E.D. Pa. 1959).

Court in *Atlantic Refining Company v. FTC.*[70] Again, the pernicious effect alleged was the defendant's method of TBA marketing. Atlantic Refining Company had agreed, in return for a commission, to assist Goodyear in promoting the sale of tires, batteries and accessories to the oil company's retail outlets. Noting the comparative strength of Atlantic, coupled with Atlantic's threats that dealerships depended upon the purchase of sufficient quantities of TBA and compliance with the Goodyear sales program, the Court found Atlantic in violation of the Clayton Act.

Two aspects of this case are particularly notable. The first is that, by dispensing with the usual economic analysis of percentages and market dominance, the Court did not establish a quantum of necessary strength. This omission is explicable by the fact that in the six-year period in question, sales of tires, batteries, and accessories totaled over fifty million dollars. The second noteworthy aspect of the case was Justice Stewart's dissent, in which he questioned the substantive conclusions of the majority opinion.[71] While coercive practices might violate the antitrust laws, he noted, the device of sales commissions in itself does not. This device had merely modified a previous Atlantic plan, under which Atlantic purchased the tires, batteries, and accessories, warehoused them, and sold them to its dealers. Under the refined plan Atlantic freed itself from the necessity for storage and distribution facilities. The old method had not enabled Atlantic any peculiar leverage over its dealers, said Justice Stewart, and neither did the new.

For the small businessman, the protection afforded, if any, is far from clear. His arm apparently may be bent, but not too far. The *Atlantic Refining* case indicates that the law is tending to offer him further insulation from economic bullying.

B. *Requirements Contracts and Tying Arrangements*

Closely related to exclusive dealings are the marketing devices of requirements contracts and tying arrangements. Although these devices are prevalent in most industries, their legal consequences are generally misunderstood. A requirements contract is an agreement by which a purchaser is required to buy all, or a specific portion, of its requirements of a product from the seller. It is a first cousin to an exclusive dealing arrangement and the courts have been but slightly more receptive to this member of the family.[72]

As with exclusive dealings, requirements contracts are subject to Section 3 of the Clayton Act with its "substantial lessening of

[70] 381 U.S. 357 (1965).

[71] 381 U.S. at 377.

[72] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Standard Oil Co. v. United States, 337 U.S. 293 (1949); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).

competition" test.[73] On its face, this test leaves room for economic justification. In *Tampa Electric Co. v. Nashville Coal Co.*,[74] a public utility executed a twenty-year coal requirements contract, under which it would purchase most of its coal needs from the seller. After a thorough examination of the relevant market area, the Court found no substantial lessening of competition.[75]

Tampa Electric has become the prototypal Section 3 case, containing elements of both benefit and harm to the relevant market. Obviously, requirements contracts foreclose market access to some degree. Whether the market is being unduly restricted requires an inquiry into the strength of the parties, the line of commerce, and the effect of pre-emption of this one sector upon the general economy. Also to be weighed in the balance are those salutary effects — the efficiency in inventory and records, and the security for a small or new business — which may prove to be the redeeming virtues of the plan.

Tying arrangements, like requirements contracts, are subject to Section 3 of the Clayton Act. A tying arrangement requires the purchaser of one product to buy another product of the seller.[76] Section 3 prohibits tying arrangements when they have the proscribed effect on competition. The peril to our economy posed by these arrangements is clear. With sufficient leverage in the tying product, a company may strong-arm its way into monopolistic control of the tied product. If a person licenses his patented product on the condition that the licensee use other patented or unpatented products of the patentee, the patentee is, in effect, extending into other areas a monopoly by grace. A strong market position in the tying product would allow him to monopolize the tied product.[77]

These tying arrangements are illegal if they have the effect of substantially lessening competition. As should by now be apparent, this assessment often emanates not from the economic facts or the conduct of the individual, but from the hypothecation of their effect upon competition. When *has* competition substantially been lessened? And how can one assume that any abating was caused by the activities of one competitor?

Two rules of thumb help to answer these conundrums with respect to tie-ins. If either index is met, substantial competition has

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[73] 15 U.S.C. § 14 (1964).

[74] 365 U.S. 320 (1961).

[75] *Id.* at 333-35.

[76] D.E. Stearns Co. v. Tinker & Rasor, 252 F.2d 589 (9th Cir. 1957); Technical Tape Corp. v. Minnesota Mining and Mfg. Co., 247 F.2d 343 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958); United States v. J.I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

[77] Binks Mfg. Co. v. Ransburg Electro-Coating Corp., 281 F.2d 252 (7th Cir. 1960); Hunter Douglas Corp. v. Lando Products, Inc., 215 F.2d 372 (9th Cir. 1954).

been affected. In the first instance, the courts look to the economic power over the tying product. In an illustrative case,[78] the defendants' volume of business was only $325,000 in an industry with a total volume of $66,000,000, about one-half of one percent of the total sales. Nevertheless, the defendants' practices were held to be monopolistic because their control of a single product allowed them to force other products on buyers.[79]

The other indicator of substantially lessened competition is the existence of a substantial quantum or control of commerce in the tied product. For example, as the patentee of salt dispensing machines, the International Salt Company leased its machines only upon the condition that lessees purchase all salt to be used in the machines from the lessor, unless they could purchase the salt at a lower price. The tied product, salt, accounted for some $500,000 in sales in the year complained of. Holding these contracts illegal, the Court said:

> The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious.[80]

Of the three methods of product-line forcing, the courts have dealt most strictly with tying contracts. Counsel should react accordingly, and, assuming that they serve few legitimate purposes short of the suppression of competition, look upon tie-ins with a most critical eye.

C. *Exclusive Territories, Rights, and Franchises*

With the increase in popularity of the francise, providing a man with a business of his own, comes an increasing demand upon the general practictioner to counsel the franchisee as to what he may ask from his corporate franchisor. The usual franchising arrangement includes some guaranty that the new business will receive a territory and perhaps products of its own for a certain time. These guarantees may raise antitrust problems. This discussion concerns only negotiations between those in vertical market relationships: manufacturer to distributor, distributor to jobber,

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[78] Oxford Varnish Corp. v. Ault and Wiborg Corp., 83 F.2d 764 (6th Cir. 1936).

[79] *Id.* at 766.

[80] International Salt, Inc. v. United States, 332 U.S. 392, 396 (1947). This case is also notable for the benchmark it set in quashing incipient monopolistic tendencies. The Supreme Court refused to void a summary judgment precluding the trial of issues as to whether the contracts substantially lessened competition, saying:

> Not only is price fixing unreasonable, *per se*, . . . but also it is unreasonable, *per se*, to foreclose competitors from any substantial market . . . . Under the law, agreements are forbidden which "tend to create a monopoly," and it is immaterial that the tendency is a creeping one rather than one that proceeds at full gallop; nor does the law await arrival at the goal before condemning the direction of the movement.

Thus, the Court employed the "either-or" test of Clayton, while using Sherman Act language to nip the activity in the bud.

jobber to retailer. Market, territorial, or customer division among those of similar, or horizontal, function is not discussed, since it is a per se violation of Section 1 of the Sherman Act.[81]

The exclusive franchise system, under which one starts in business with the assurance of the franchisor that he will not franchise competition within a delineated area, remains a permissible and highly satisfactory method of commercial expansion.[82] The method, however, has its legal limitations and should be drafted with an eye to reasonableness in geographic scope and in duration.

Abuse of the franchise system can bring down upon the head of the franchisor a charge of restricting the free flow of goods in commerce and potentially blocking entry of competition. Illustrative of this situation is *Hathaway Motors, Inc. v. General Motors Corp.*,[83] in which the complaint stated a cause of action by alleging that automobile manufacturers maintained a system of exclusive dealer franchises which excluded from the sale of new cars the independents who would not yield to the system. The court felt that the alleged scheme, which included pressure on banks, finance companies, newspapers, and legislative bodies, as well as on those within the industry, would, if proved, constitute a real detriment to the consumer.[84]

Customer and territorial restrictions were both challenged in *White Motor Co. v. United States*,[85] where the Supreme Court held improper the conviction by summary judgment of a truck manufacturer's distribution system. Not atypically, the manufacturer had divided areas and accounts among its distributors, reserving for itself choice industrial, governmental and fleet customers. The Supreme Court rejected the situation as the test case for vertical territorial restrictions, because not enough appeared in the record as to the actual impact of the distribution system on competition.[86] The Court remanded the case for further proof, and a consent judgment[87] frustrated the potential enlightenment of the business community. Nevertheless, by way of dictum, the Court indicated that vertical territorial limitations and customer restrictions may be justifiable and that they could not be barred on the theory that resale price-fixing restrictions were an integral part of the whole distri-

[81] Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

[82] *See, e.g.*, Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.D.C. 1957).

[83] 18 F.R.D. 283 (D. Conn. 1955).

[84] *Id.* at 284,285.

[85] 372 U.S. 253 (1963).

[86] *Id.* at 263.

[87] Reported at 1964 Trade Cas. ¶ 71,195, at 79,762 (N.D. Ohio Sept. 8, 1964).

bution system if the price restrictions involved an insubstantial amount of business.[88]

In the summer of this year, the United States Supreme Court added an interesting, if far from definitive, gloss to the law of territorial restriction. The Department of Justice challenged the marketing program of a leading bicycle producer. Distributors had been assigned territories and were instructed to sell only to franchised Schwinn accounts. Franchised retailers were not allowed to resell to non-franchise dealers. The actual distribution took three forms: assignment and agency sales to dealers through distributors, direct sales to distributors, and direct sales to dealers with the distributors handling orders on commission. The deleterious effect was asserted to be, not upon the bicycle market as a whole, but simply upon the intrabrand competition which constituted one-seventh of the total industry volume.[89] The Court held illegal, under Section 1 of the Sherman Act, the two requirements under which bicycles purchased by distributors had to go to franchised dealers, and those prohibiting franchised dealers from selling to non-franchised dealers. Upheld as reasonable restraints of trade were the territorial and customer restrictions applied to bicycles handled by distributors through agency or consignment arrangements.[90]

Influencing the Court strongly in its decision were the availability of competitive bicycles, the healthy, vigorous competitive arena justifying the marketing program, the ability of Schwinn distributors and retailers to handle other brands, and the failure of the government to prove the alleged intermixture of this distribution program with price fixing. The Court approved this restrictive distribution as an exercise of sound business reason, but warned that

> [t]he promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved.[91]

If this case establishes any definition of legality, then it is the fleeting one of sound business practice. For the lawyer and his client, however, flirting with an evanescent boundary is a precarious practice indeed. The following remarks of Donald S. Turner, the

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[88] 372 U.S. at 263.

[89] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

[90] *Id.* at 381.

[91] *Id.* at 375. *See also* United States v. Sealy, Inc., 388 U.S. 350 (1967), holding illegal a horizontal conspiracy to allocate territories among trademarks.

head of the Antitrust Division of the Department of Justice, suggest no rule itself but a sound approach to rule-making:

> [I] am not convinced that territorial restrictions are reasonably necessary to any legitimate purpose save for one case, that involving the entry of new firms and/or the introduction of new products. These are commonly associated with relatively high degrees of risk and uncertainty, and it is not unreasonable to suppose that territorial restrictions may be necessary in many of such cases to induce dealers to make the investment necessary to get the manufacturer's new product effectively introduced. . . . It should be noted, however, that, even in this case, the justification for territorial restrictions is one limited in time.
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> . . . Territorial restrictions might be justifiable where they appear to be the only method by which a weak firm can obtain dealers. Nevertheless, while it is undoubtedly good antitrust policy, generally speaking, to foster new entry, I am not at all sure that it is good antitrust policy to attempt to preserve in this way companies that have run the competitive race and have been fairly beaten.
>
> To conclude, my tentative view is that territorial restrictions on dealers are more restricted than is necessary to obtain legitimate objectives in all but very limited circumstances. There are ample alternative devices, all less restrictive than territorial restraints, whereby a manufacturer can attempt to achieve an efficient, aggressive marketing system.[92]

The legality of an exclusive market, then, depends primarily on the reason for exclusivity in establishing, entering, or enlarging a given market. Must a new franchisee get an area to himself to survive? If he does, how large and for how long? Will the security promised put him on an equal competitive footing, or a more lofty position, beyond the reach of the existing competitors? Exclusivity, whether in dealing, market allocation, or requirements purchasing, is a tool easily abused. The conservative practitioner will insure its proper use by employing it purposefully.

IV. TRADE ASSOCIATIONS

Competing business firms often meet with one another in an attempt to improve their industry, and in the process, to assist the individual firms themselves. To establish regular and proper procedures, they may decide to form a trade association. The antitrust problems attendant to trade associations are more likely to arise with the small businessman than with the large corporation, for the small independent enterprise would more likely find in association a mode of competing with the diversified giant.

Two patent facts of trade association life are notable. The antitrust laws hold many acts, legal if done individually, illegal if

[92] Turner, *Some Reflections on Antitrust*, 1966 NEW YORK STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 4-6.

done in concert. Similarly, any activity illegal if done outside a trade association is more easily proved illegal if done within it, for by definition, a trade association involves competitors in concert. Therefore, where conspiracy or combination is an element of the offense, the existence of a trade association may tend to prove that conspiracy.

Without defense, trade associations are in contravention of the Sherman Act if they allocate territories or customers, restrict production, limit channels of distribution, or fix and maintain prices (assuming of course, the requisite effect on interstate commerce).[93] As recently as 1962, the Department of Justice proved a scheme among pharmacists to maintain a schedule of prices for prescription drugs.[94] This and other abuses of trade associations serve to confirm the suspicion that the Justice Department shares with Adam Smith:

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.[95]

Is this suspicion justified? Are there no legitimate purposes which a trade association can foster? The fact that they are growing faster than consent decrees quash them indicates the contrary.[96] Associations can, and indeed do, develop new merchandising, research, technical services and markets. They may conduct distribution studies, industry advertising campaigns, and trade shows. Tax research, apprentice education, employee relations, arbitration, and government-industry liason are all valid and fruitful areas of association concern, areas served particularly well by representatives of an entire industry.[97]

Between these two lines of permissiveness and per se illegality lie the troublesome situations in which one must look to the unique combination of factors involved. The collection and distribution of freight rate information was, when first challenged, found to be a

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[93] The crucial cases in the area, to which relatively little has since been added, are the following: Sugar Institute v. United States, 297 U.S. 553 (1936); Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

[94] United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29, 33 (D. Utah 1962):

> The mere circumstance that goods in commerce are treated or handled by, or otherwise connected with, a learned profession does not remove the goods themselves, nor transactions affecting them, from the applicability of the Sherman Act.

[95] A. SMITH, THE WEALTH OF NATIONS 128 (1st Modern Library ed. 1937).

[96] Indeed, they are growing at a rate faster than that of the natural population. JUDKINS, DIRECTORY OF NATIONAL ASSOCIATIONS OF BUSINESSMEN (1961).

[97] For a list of some eighty activities, see Judkins, Services of American Trade Associations in 1953 (U.S. Dep't of Commerce, mimeo. Aug. 1954).

lawful activity.[98] In a later case, however, the defendant afforded its members the use of a common freight rate book. The Supreme Court felt that such horizontal accessibility to a critical element in price compilation was an element of competitive restraint and evidence of illegal concert on pricing methods.[99]

In contrast to common rate schemes, efforts by associations to standardize products are, in themselves, innocent and valuable. Caution must be exercised to insure that this attempt to standardize is voluntary, and limited to the product itself;[100] any carry-over towards standardization of merchandising or pricing will taint the entire program.[101] In addition, there should be some tangible benefit of standardization, both to the public and to the industry itself.

Another device often attempted by associations is the pooling of statistical information for association members. These collections save members' time and can actually increase competition within a given industry. The exchange of statistical information, however, affords a perilous opportunity for competitors to evolve a price-fixing or production-limiting scheme.[102] For this reason, any statistical activities should meet the following criteria: (1) concern for the present, rather than the future; (2) reference to no individual company; (3) maintenance on a voluntary basis; and (4) distribution of statistics to any interested or appropriate parties including the government.

Cost and price reporting programs touch the most sensitive antitrust area and therefore should be conscientiously overseen. The pooling of price and cost information is permissible when giving rise to no conspiratorial inference,[103] but if concerted action is "contemplated and invited," and the competitors accept that invi-

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[98] Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563 (1925); Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925).

[99] FTC v. Cement Institute, 333 U.S. 683 (1948).

[100] Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948).

[101] An analysis of the way good intentions are often extended beyond the pale of the law is found in Bond, Crown, & Cork Co. v. FTC, 176 F.2d 974, 979 (4th Cir. 1959):

> The standardization of product, for example, would be innocent enough by itself, but not when taken in connection with standardization of discounts and differentials, publication of prices with agreements not to charge less than a minimum under patent license agreements affecting practically the entire industry, the freight equalization which we have described and such uniformity of prices throughout the industry as to leave no price competition of any sort anywhere. The practice of freight equalization might be all right if used by the manufacturers individually, but not when used in connection with standardization of product, patent control, price publication and uniformity of discounts and trade practices in such way as to destroy price competition.

[102] *See* United States v. Hartford-Empire Co., 323 U.S. 386 (1945); United States v. American Linseed Oil Co., 262 U.S. 371 (1923).

[103] Cement Mfrs.' Protective Ass'n v. United States, 268 U.S. 588 (1925).

tation, even though their acceptance may be mute and tacit, the Sherman Act is violated.[104]

Credit activities and services by trade associations suffer similarly low toleration. The mere reporting of delinquent accounts is a proper activity if devoted to a purpose not anti-competitive. Unfortunately, in all recent litigation the trade association has extrapolated from its credit reporting a blacklist system, which is illegal as a combination to boycott.[105]

Apart from the legality of devices employed by trade associations, the constitution of the association itself may encounter legal difficulties. While the exclusion of competitors from membership is illegal, that of persons not within the trade group is permissible.[106] Simply stated, membership may be restricted so long as the standards for restriction are not inhibitive of competition. If an association contemplates operating within the aegis of the antitrust laws, it should have no compunction about opening its membership rolls. Inclusion of the vertical components of an industry in a trade group, however, is dangerous since it might create a fraternal approach towards elements of the economy which, under the philosophy of the Sherman Act, are more properly thrashed out in competition.[107]

The association should certainly formalize a statement of purpose, specifying those worthwhile and legitimate ends it seeks to achieve. At least one association was so overzealous and particular in this attempt that it found its "Code of Fair Competition" struck down by a court which disagreed with its characterization of the

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[104] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939). This case is generally recognized as the genesis for the doctrine known as "conscious parallelism," under which a conspiracy and violation of the antitrust laws can be inferred simply from the conduct of businessmen, each of whom knows his competitors are behaving similarly. The doctrine enjoyed a dangerous growth in judicial popularity, at the peak of which a conspiracy could be proved by nothing more than uniform participation by competitors in a business practice injurious to trade, when the participators knew of the others' activity. Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); Bigalow v. RKO Radio Pictures, Inc., 150 F.2d 877 (7th Cir. 1945), *rev'd on other grounds*, 327 U.S. 251 (1946). Its limits were, however, eventually recognized by the Supreme Court, which avowed that it "has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." Theatre Enterprises, Inc. v. Paramount Film Distribution Corp., 346 U.S. 537, 540-41 (1954). The validity of conscious parallelism is aptly demonstrated by this analogy from the classroom of Professor Milton Handler: if his 100 students appear at law school with raincoats and umbrellas, whether a conspiracy could be inferred will depend largely upon whether it looks like rain.

[105] *See, e.g.*, Tag Mfrs.' Institute v. FTC, 174 F.2d 452 (1st Cir. 1949).

[106] *Cf.* United States v. Insurance Bd., 188 F. Supp. 949 (N.D. Ohio 1960); United States v. Southern Wholesale Grocers' Ass'n, 207 F. 434 (N.D. Ala. 1913). *See also* United States v. New Orleans Exch., 148 F. Supp. 915 (E.D. La. 1957), *aff'd*, 355 U.S. 22 (1957); American Fed'n of Tobacco Growers, Inc. v. Neal, 183 F.2d 869 (4th Cir. 1950); Associated Press v. United States, 326 U.S. 1 (1945).

[107] Radiant Burners, Inc. v. People's Gas Light & Coke Co., 364 U.S. 656 (1961); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); Advertising Specialty Nat'l Ass'n v. FTC, 238 F.2d 108 (1st Cir. 1956).

code.[108] The punctiliousness with which minutes of meetings are kept, the presence of able counsel, and the constant supervision by trade association officers or employees will all contribute to maintaining a course between inefficacy on the one hand and illegality on the other.

V. PRIVATE SUITS — THE TREBLE DAMAGE ACTION

Those who violate the antitrust laws may, like Lear, suffer doubly. There is first the threat of criminal prosecution, fine, and imprisonment. There is also the possibility of a treble damage action brought by those whom the violation has injured. In the remaining pages, attention will be focused on the popularity of this civil remedy and the possibility of injunctive relief. Also discussed are the elements of proof: an antitrust violation; injury to the plaintiff; and computation of damages. Finally, some attention is given to attorney's fees and other costs of the litigation.

The private civil action is peculiarly suited to enforcing the antitrust laws and to compensating the victim. Industry members are more likely to know when unfair competitive practices are being used against them, and the incentive of recovering three times their damages will encourage them to act on that knowledge. The increase in popularity of this remedy is evidenced by the following table:[109]

NUMBER OF ANTITRUST CASES COMMENCED IN UNITED STATES DISTRICT COURTS BY FISCAL YEARS

	1941-1945	1946-1950	1951-1955	1956-1960	1961-1965
Government Suits	284	256	197	317	346
Private Suits	297	529	1054	1163	3598

The primary basis of the civil action is Section 4 of the Clayton Act.[110] In addition, Section 16 provides private litigants with injunctive relief from a violation which threatens direct and serious loss or damage to the plaintiff.[111] Injunctions, however, have not often been sought, for most defendants who have been sued successfully for treble damages will voluntarily eschew conduct that would similarly jeopardize them in the future.

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[108] United States v. Abrasive Grain Ass'n, 1948 Trade Cas. ¶ 62,329, at 62,839 (S.D. N.Y. Nov. 16, 1948).

[109] Note, 79 HARV. L. REV. 1475 (1966).

[110] 15 U.S.C. § 15 (1964):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[111] 15 U.S.C. § 26 (1964).

Because injunctive relief is seldom demanded, the principal weapon of the private litigant is the treble damage action. The elements of this action are simply a violation of the antitrust laws, causing injury to the plaintiff's business or property.[112] As is apparent from the earlier discussion, comprehending when a violation has occurred is in itself no mean feat. Proving the violation without the investigative and prosecutorial staff available to the government would be even more difficult, and more expensive. In recognition of this burden, Congress has given the private litigant Section 5(a) of the Clayton Act, providing that a final judgment or decree in a government suit, either civil or criminal, is admissible as prima facie evidence "as to all matters respecting which said judgment or decree would be an estoppel . . . ."[113] Among other exclusions, if the government's suit ended in a consent judgment or one entered before the taking of testimony, this section has no application.[114]

A decree adduced through government litigation, then, provides the basis for anyone injured by the defendant to sue for treble damages, having as prima facie evidence "all matters of fact and law necessarily decided in the previous case."[115] Because the grant is an expansive one, the courts have rigorously upheld its stated exceptions. For example, even though the issues had received full hearing, if a judgment for the plaintiff was rendered but was reversed on appeal, the fact that a consent decree had been entered upon remand precluded use of the decree in a later suit.[116] A judgment entered on a plea of nolo contendere has also been excluded from the scope of this section.[117]

Therefore, if one's client seeks redress from a defendant whose nolo plea has been accepted, he must prove the antitrust violation by independent evidence. If, however, the transgressor has pleaded guilty in the government action, the plaintiff stands to benefit from Section 5. Contrary to former indications,[118] guilty pleas have generally not been treated as consent judgments. In the recent electrical equipment cases, three different circuits have held that guilty pleas are not within the consent judgment proviso.[119] This line of prece-

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[112] *Id.* § 15.

[113] *Id.* § 16(a).

[114] *Id.*

[115] Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

[116] Barnsdall Refining Corp. v. Birnamwood Oil Corp., 32 F. Supp. 308, 311 (E.D. Wis. 1940).

[117] City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964).

[118] Barnsdall Refining Corp. v. Birnamwood Oil Corp., 32 F. Supp. 308 (E.D. Wis. 1940); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939).

[119] General Elec. Co. v. San Antonio, 334 F.2d 480 (5th Cir. 1964); City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *cert. denied,* 375 U.S. 939 (1964).

dent establishes a direct, current trend permitting prior guilty pleas to establish a prima facie civil case.

While these cases facilitate the plaintiff's situation, his counsel should nevertheless be aware of the evidential limitations of Section 5(a). The prior adjudication sustains not his entire case but merely all matters adjudicated as between the government and the defendant. The general test is that of collateral estoppel: what matters have conclusively been established between the parties?[120] Another limitation lies in the fact that the statute gives to this evidence only a prima facie effect; the evidence is not conclusive and may be rebutted.[121]

After the violation is established, either by independent evidence or through use of a former judgment, the plaintiff must prove injury, causation, and a quantum of damage. The injury must, of course, be a direct result of the violation; incidental harm is not enough.[122] While damages cannot be conjectural, the courts will not require mathematical accuracy in proving the effects of abating competition.[123] Factors which can be proffered in making this proof include increased cost caused by the violation,[124] loss of profits on business either actually done or which was anticipated,[125] and the decreased price a seller obtained for his goods.[126]

Most important in computing damages is the "but for" test. Plaintiffs are entitled to recover three times the difference between what business they actually did and what they would have done "but for" the defendant's abuse.[127] Even though excess costs resulting from violation may have been passed on to the plaintiff's customers, they remain a part of recoverable damages.[128] One circuit court has acknowledged that this rule, in fact, allows a plaintiff

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[120] *See* RESTATEMENT OF JUDGMENTS § 68 (1942); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).

[121] Richfield Oil Corp. v. Karseal Corp. 271 F.2d 709 (9th Cir. 1959), *cert. denied,* 361 U.S. 961 (1960); Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86, 90 (10th Cir. 1954), *cert. denied,* 347 U.S. 976 (1954).

[122] Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54 (9th Cir. 1951).

[123] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931); Momad v. Universal Film Exchanges, Inc., 172 F.2d 37, 42 (1st Cir. 1948).

[124] Chattanooga Foundry & Pipeworks Co. v. Atlanta, 203 U.S. 390 (1906).

[125] Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).

[126] American Crystal Sugar v. Mandeville Island Farms, 195 F.2d 622 (9th Cir. 1952).

[127] *See, e.g.,* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-62 (1931).

[128] The defense of "passing on," while not new in the field, received particular attention in several of the recent electrical cases. *See* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203 (7th Cir. 1964); Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59 (S.D.N.Y. 1964); Public Util. Dist. No. 1 v. General Elec. Co., 230 F. Supp. 744 (W.D. Wash. 1964); and Notes at 64 COLUM. L.Rev. 570, 586 (1964), 70 YALE L.J. 469 (1961), and 79 HARV. L. REV. 1475 (1966).

to recover four times his damages — once from its customers and thrice from the defendants.[129]

Finally, some attention should be given to that most urgent of a client's concerns — cost. As we have seen, an antitrust action differs from others, less in substance than in size. The fees and costs involved are also commensurately larger. A prominent member of the plaintiff's bar estimates that the minimal cost for the smallest of cases is $5,000. For fees, he recommends a retainer of $5,000 to $25,000, a percentage on damage recovery, and an agreement as to the amount of attorneys' fees granted by the court.[130]

The treble damage provision of our present law is the atavistic remains of the English Statute of Monopolies of 1623. Vilified by defense counsel, attacked by legislation, it remains a real incentive for private industry to police itself. As the remedy gains more frequent use, specialist and general practitioner alike should educate themselves to its perils and its possibilities.

CONCLUSION

There are indeed few areas of business endeavor beyond the application of the laws regulating trade. Pricing, discounts and allowances, distribution, franchising, territorial and customer restrictions, exclusive dealings, refusals to deal, advertising allowances and services, reciprocity — all may bring the businessman in contact with a variety of state and federal laws. His lawyer should be prepared to render preventative counsel, lest the client be subjected to the civil and criminal sanctions provided for antitrust violations.

In addition, the lawyer for the small businessman should inform his client of the competitive tools built into the antitrust laws. Trade associations have a wide range of permissible activities, each of which can enrich the individual by strengthening the industry. Unfair or predatory competition may be rooted out and punished, with a treble-damage bounty going to the injured plaintiff. Finally, the small businessman has in the antitrust laws both state and private protection from the anti-competitive demands of influential suppliers and customers.

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[129] Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 209 (7th Cir. 1964).

[130] Alioto, *The Economics of a Treble Damage Case*, 32 ANTITRUST L.J. 87, 93 (1966).

THE ULTIMATE FICTION

BY ALICE AUSTIN SOLED*

Mrs. Soled contends that the very existence of "legal fictions" is the ultimate fiction. She examines the traditional axiomatic propositions that legal fictions exist and that legal fictions are not real, contending that these traditional conceptualizations result in many factual situations being paradoxically characterized as illegal, although simultaneously being treated as if they were legal. She illustrates the confusion involved in the application of legal fictions in the areas of corporate law, public offices and legislatures, divorce, and international recognition. In Mrs. Soled's analysis the confusion surrounding the application of legal fiction in all of these areas results from the basic assumption that law is based upon objective reality. She denies the relevance of the distinction between "reality" and "fiction" insofar as the law is concerned, and starting with the assumption that law is based upon "subjective reality" proposes an alternative conceptualization, relative recognition, which avoids the logical pitfalls of traditional analysis.

THE EXISTENCE of "legal fictions"** is an axiom of legal theory.[1] It is the inevitable complement of the axiom that the Law is constructed upon objective reality.[2] Both axioms are common to almost all concepts of the law.[3] Both also are fallacious.

Coexistent with these fallacies, and dependent for its continued existence upon them, is a conceptual confusion as to the meaning attributable to "Law," for the purpose of applying the terms "legal," "legality," "illegal," and "illegality." This confusion has generated the juristic classification of factual situations as (1) legal; or (2) illegal; or (3) illegal, but treated as legal, *i.e.*, simultaneously legal and illegal. This categorization is doubly objectionable: First, it postulates a paradox — the synonymity of the antonymous concepts "legality" and "illegality." Second, it involves a misconception as to the nature of the analysis to be made.

Acknowledgment that the Law is a creature of subjective reality, necessarily will result in clarification of the meaning attributable to "Law" in the above context. The effect of this elucidation will be to rectify the prevalent error as to the character of the analysis which should be made.

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**All words or phrases enclosed in quotation marks upon their first appearance in this article shall be read as if so enclosed upon all subsequent appearances herein.

[1] *See* J. FRANK, LAW AND THE MODERN MIND 32-41, 312-22 (1949); J. GRAY, THE NATURE AND SOURCES OF THE LAW 30-64 (2d ed. 1927); P. TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW 294-300, 383-99 (1922); Fuller, *Legal Fictions* (pts. 1-3), 25 ILL. L. REV. 363, 513, 877 (1930-1931).

[2] *See* note 1 *supra.*

[3] *See, e.g.,* J. GRAY, *supra* note 1, chs. II & IV; Fuller, *supra* note 1.

I. THE LAW IS PREMISED UPON SUBJECTIVE REALITY.

Many and varied are the definitions of the "Law." At one end of the spectrum is the theory that "[t]he Law . . . is identical with the rules laid down by the judges, but those rules are laid down by the judges because they are the Law, they are not the Law because they are laid down by the judges . . . ,"[4] *i.e.* "the judges discover pre-existing Law . . . ."[5] At the other end of the spectrum is the hypothesis that "[t]he Law . . . is composed of the rules which the courts, that is, the judicial organs . . . lay down for the determination of legal rights and duties."[6] In other words, "*the* Law is the body of rules which the courts . . . apply in deciding cases."[7] Between these two extremes lies Austin's definition of Law as commands of the sovereign.[8] Also in the median range, is the supposition that "the courts, in deciding cases, are, in truth, applying what has previously existed in the common consciousness of the people."[9]

Common to all these concepts of the Law is the axiom that "legal fictions" exist.[10] According to Fuller, for example:

> Probably no lawyer would deny that judges and writers on legal topics frequently make statements which they know to be false. These statements are called "fictions." There is scarcely a field of the law in which one does not encounter one after another of these conceits of the legal imagination. . . . Even the austere science of Jurisprudence has not found it possible to dispense with fiction. The influence of the fiction extends to every department of the jurist's activities.[11]

Similarly, according to Tourtoulon, "juridical logic often asserts what is false. . . . The fiction is the algebra of law, and a picturesque form of algebra besides."[12] Tourtoulon further states:

> [T]he fiction has played a part in law exactly identical with that of the metaphor in language. A whole world of fiction has gone toward the making of juridical ideas which seem to us most practical and familiar. The legal systems which were the richest in

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[4] J. GRAY, *supra* note 1, at 93.

[5] *Id.* at 96. *See also* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 161 (M. Hall ed. 1947): "The old Blackstonian theory of pre-existing rules of law which judges found, but did not make . . . ."; J. FRANK, *supra* note 1, at 32.

[6] J. GRAY, *supra* note 1, at 84.

[7] *Id.* at 110. *See also* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, *supra* note 5, at 158: "The theory of the older writers . . . was that judges did not legislate at all. A pre-existing rule was there . . . . From holding that the law is never made by judges, the votaries of the Austinian analysis have been led at times to the conclusion that it is never made by anyone else." J. FRANK, *supra* note 1, at 33; W. FRIEDMANN, LEGAL THEORY 218-19 (4th ed. 1960); J. SALMOND, JURISPRUDENCE § 20 (7th ed. 1924).

[8] 1 J. AUSTIN, JURISPRUDENCE (4th ed. 1873); W. FRIEDMANN, *supra* note 7, at 211-13; J. GRAY, *supra* note 1, at 85.

[9] J. GRAY, *supra* note 1, at 89.

[10] Note 1 *supra.*

[11] Fuller, *supra* note 1, at 363.

[12] P. TOURTOULON, *supra* note 1, at 385.

> imagery at their origin are today the richest in precise and learned conceptions, and it was by passing from fiction to fiction that their most important progress has been realized. . . . The oldest and most essential ideas are nearly all, if not all, fictitious.[13]

Although it is considered axiomatic that there are such creatures as legal fictions, it is asserted, with equal dogmatism, that legal fictions are not real.[14] This is true even of those who maintain that the law consists of the rules recognized and applied by judges in deciding cases.[15] Thus, it has been said:

> One who employs a fiction makes a statement which deviates from or contradicts reality, but with full awareness of this deviation or contradiction. . . . The chief characteristics of a fiction are . . . [i]ts arbitrary deviation from reality. . . . Fictions are "assumptions made with a full realization of the impossibility of the thing assumed." . . . One must guard against the vice of assuming that, because a fiction is useful, it therefore has objective validity. "The gulf between reality and fiction must always be stressed"; one must avoid "the fundamental error of converting fictions into reality."[16]

Common definitions of "legal fictions" explicitly assume that such fictions are not real. A legal fiction has been defined as "[a]n assumption of a possible thing as a fact irrespective of the question of its truth . . . ."[17] It further has been described as a "statement made with full consciousness, at the moment of utterance, that it does not correspond to the truth of the matter . . . ."[18] Tourtoulon has stated that "the fiction is the enunciation of a fact which is false and is recognized and presented as false. . . . The juridical nature of all of these assertions is identical; when one enunciates them without being his own dupe or wishing to dupe others, a fiction is created."[19]

"Reality" commonly is defined as the "[s]tate, character, quality, or fact of being real, existent . . . or of having real being or existence . . . . That which actually exists, that which is not imagination, fiction or pretense . . . ."[20] It would appear, therefore, that by defition, fictions cannot be considered as real. For the concept of "fiction" exists only as a correlative of the concept of "reality." Yet, as a matter of semantics, "reality" has a dual connotation. In common usage, "reality" is understood to denote objective reality — "That which actually exists . . . that which has objective existence, and is

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[13] *Id.* at 387.

[14] Note 1 *supra.*

[15] J. FRANK, *supra* note 1; J. GRAY, *supra* note 1.

[16] J. FRANK, *supra* note 1, at 312. *See also* P. TOURTOULON, *supra* note 1, at 385: "[T]he fiction does falsify reality . . . ."

[17] WEBSTER'S NEW INT'L DICTIONARY 940 (Fiction) (2d ed. unabr. 1937).

[18] J. FRANK, *supra* note 1, at 312.

[19] P. TOURTOULON, *supra* note 1, at 384. *Cf.* Fuller, *supra* note 1, at 369: "A fiction is either, (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."

[20] WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937).

not merely an idea."[21] "Reality," however, also can be subjective in nature. Subjective reality is "reality as perceived or known as opposed to reality as independent of mind . . . ."[22] The concept of "subjective reality" is expressed most succinctly as *esse est percipi* — to be is to be perceived.[23] In other words, subjective reality is that which is perceived or recognized as having actual existence.[24] Since the relationship of legal fictions to reality customarily is defined *only* in terms of objective reality,[25] the fact that the concepts of "legal fictions" and "reality" are considered to be mutually exclusive[26] is not determinative of whether legal fictions are real. For, the concept of "fiction" is correlative *only* to the concept of "*objective* reality."[27]

Thus, definition of legal fictions in terms of objective reality is required only by, and dependent upon, the assumption that the Law is based upon objective reality — that there is such an animal as an "objective legal truth."[28] Yet, the very writers who postulate the Law to be constructed upon objective reality state categorically that it is, in fact, constructed upon legal fictions.[29] The argument, however, is presented most cogently by Tourtoulon,[30] who observes:

> [V]ery old fictions are no longer considered as such. All of our institutions were of a fictitious character originally; if one would try to strip the Law of every fiction of the past as well as of the

[21] *Id.*

[22] WEBSTER'S COLLEGIATE DICTIONARY 992 (Subjective) (5th ed. 1946). *See also* Idealism.

[23] This concept also is known as Berkleianism, in honor of its proud parent, George Berkeley, Bishop of Cloyne. See B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 648 *et seq.* (1961).

[24] WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality), 2510 (Subjective), 1815 (Perceive), 520 (Cognizance) (2d ed. unabr. 1937).

[25] WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937).

[26] J. FRANK, *supra* note 1, at 312; WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937).

[27] WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937). *See also* authorities cited note 1 *supra.*

[28] *See* J. FRANK, *supra* note 1; P. TOURTOULON, *supra* note 1; WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937). Frank, for example, states, *supra* at 37, that "[l]egal fictions are mistaken for objective legal truths . . . ."

[29] J. FRANK, *supra* note 1; J. GRAY, *supra* note 1. Gray, for example, observes, *supra* at 31, 34, and 35, that "[f]ictions have played an important part in the administration of the Law in England . . . . There was no lack of other fictions in the English Law, in the shape of allegations which one of the parties made and the other was not allowed to deny, in order that the wine of new law might be put into the bottles of old procedure. . . . Such fictions are scaffolding, — useful, almost necessary, in construction . . . ." Frank comments, *supra* at 40: "Neither in law nor elsewhere could we afford to do away with fictional contrivances." In addition, Frank, *supra* at 39, quotes Bentham's vituperative views on "legal fictions": " 'Lying, he might have said, without any such hyperbole — lying and nonsense compose the groundwork of English Judicature. . . . In English law, fiction is a syphilis which runs in every vein, and carries into every part of the system the principle of rottenness.' " *See also* R. POUND, THE SPIRIT OF THE COMMON LAW 166-73 (1921); Fuller, *supra* note 1.

[30] Who, it should be noted, considers it to be a "strange delusion that the law can be constructed upon objective realities." P. TOURTOULON, *supra* note 1, at 295.

> present, not much would be left.[31] [He further observes that] [i]t would not therefore be inaccurate to claim that our reality is simply fiction differentiated, and that at bottom all law is reduced to a series of fictions heaped one upon another in successive layers.[32]

Once it is recognized that the Law is constructed upon legal fictions, as opposed to objective reality, the true relation of legal fictions to legal reality becomes apparent.

Subjective reality is that which is perceived or recognized as having actual existence.[33] A legal fiction is the enunciation of a fact which is or may be false, but which the Law recognizes as having actual existence.[34] Therefore, legal fictions are subjectively real.

Since the Law is constructed upon legal fictions,[35] and legal fictions are subjectively real, the Law is constructed upon subjective reality.

Recognition of subjective reality as the substratum of the Law is implicit in discussion of "legal fictions" *qua* "fictions."[36] Thus, Tourtoulon:

> Finally, precisely because the fiction does falsify reality, it frequently happens that it is very strictly and subjectively exact, much more strictly so than any other form of thought expression . . . . A fiction, be it understood, is only a juridical "construction" like any other . . . . In any case, one must steer clear of the belief that a fictitious construction is opposed to a real one. Every juridical construction is simply a question of form, hence arbitrary and artificial. The fiction is a form created by the imagination . . . . [L]ogically, it is absolutely identical with any other form.[37]

Timberg, moreover, observes that "[o]ur knowledge of all 'reality' is largely referential and symbolic, and fictions, therefore, necessary logical expedients on which we must rely."[38] He also quotes from *The Philosophy of As If,* by Vaihinger: " 'A fiction can

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[31] *Id.* at 388.

[32] *Id.* at 387.

[33] *See* note 24 *supra.*

[34] BLACK'S LAW DICTIONARY 772 (Fiction) (3d ed. 1933). This premise has been stated: *Fictio est contra veritatem, sed pro veritate habetur.* (Fiction is against the truth, but it is to be esteemed truth.)

[35] *See* notes 29, 31, 32 *supra.*

[36] *See* J. FRANK, *supra* note 1; P. TOURTOULON, *supra* note 1; Fuller, *supra* note 1; Timberg, *Corporate Fictions,* 46 COLUM. L. REV. 533, 540 *et. seq.* (1946).

[37] P. TOURTOULON, *supra* note 1, at 385, 391. Similarly, Patterson relates that Professor Dewey told his students "that, logically speaking, a fact and a fiction are the same." *Pragmatism As a Philosophy of Law,* reprinted from THE PHILOSOPHER OF THE COMMON MAN 181 (1940). Patterson further stated, at 224 of An Introduction to Jurisprudence (4th mimeographed ed. 1951): "We call a 'legal fiction' any affirmation that a certain symbol (word or phrase) that is connotative in a legal context has a denotative reference that contradicts the denotative reference of the same symbol in some other context, usually that of popular language. Thus the affirmation that 'husband and wife are one person' in the English common law had a considerable variety of legal consequences, and *in that context* it was a warranted ('true') assertion. Thus Professor Dewey said that *in that context* it was a 'legal fact'. Only when we transfer the affirmation to another context does it become fictitious."

[38] Timberg, *supra* note 36, at 541.

be substituted for the actual world . . . but it is not a picture of true reality, it is only a sign used in order to deal with reality, a logical expedient devised to enable us to move about and act in the real world.' "[39]

Frank, by tacitly acknowledging the subjective reality of legal fictions, also accords implicit recognition to subjective reality as the foundation of the Law.[40] Although he approves Vaihinger's thesis that "[o]ne must guard against the vice of assuming that, because a fiction is useful, it therefore has objective validity,"[41] he refers, several times, to the existence of "valid fictions."[42] Since "validity" connotes "reality,"[43] Frank must be presumed to be acknowledging the non-objective, or subjective, reality of fictions.

Recognition of subjective reality as the substratum of the Law is explicit, as well as implicit. Kelsen's Pure Theory of Law categorically denies the existence, in Law, of objective facts: Law is based solely upon subjective facts, upon only those facts recognized as such by the Law.[44] In other words,

> In the world of law, there is no fact "in itself," no "absolute" fact, there are only facts ascertained by a competent organ in a procedure prescribed by law . . . . It is a typical layman's opinion that there are absolute, immediately evident facts. Only by being first ascertained through a legal procedure are facts brought into the sphere of law or do they, so to speak, come into existence within this sphere. Formulating this in a somewhat paradoxically pointed way, we could say that the competent organ ascertaining the conditioning facts legally "creates" these facts.[45]

Similarly, Nékam states:

> There is no exterior reality, no absolute fact, no natural relation, which by itself could necessarily enter into the system of the law, or could have any legal significance merely because of its experimental existence, or could become what might be called "legal reality" . . . .[46]
>
> Law must somehow correspond to reality . . . . But the reality of law . . . cannot consist of its concepts being present as, or represented and determined by, the experimental realities of the outside world. Its reality is entirely subjective.[47]

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[39] *Id.* n.36.

[40] Note 29 *supra.*

[41] J. FRANK, *supra* note 1, at 312.

[42] *Id.* at 37, 320. "This is not the place to discuss at length the immense importance of valid fictions. Suffice it to say that valid fictions . . . are invaluable."

[43] WEBSTER'S COLLEGIATE DICTIONARY 1105 (Validity), 1075 (Truth) (5th ed. 1946).

[44] H. KELSEN, GENERAL THEORY OF LAW AND STATE (A. Wedberg transl. 1961).

[45] *Id.* at 135-36.

[46] A. NEKAM, THE PERSONALITY CONCEPT OF THE LEGAL ENTITY 8 (1938).

[47] *Id.* at 55.

> [E]verything which is reality in the world of the law is such only because the law created it . . . .[48]

Since the concept "legal fiction" can be conceived only as a correlative of the concept "objective legal reality," recognition that the Law is founded upon subjective reality should result in the elimination of the phrase "legal fictions," from legal vocabulary and thought. Nevertheless, writers in the area have clung as tenaciously to the concept of legal fictions as a bulldog to the throat of his prey. Fuller, for example, considers a complete elimination of legal fictions to be impossible.[49] Frank asserts the existence of "valid fictions."[50] And Tourtoulon avers that "juridical theory is all the more objective when it presents itself as fictitious, and all the more delusive when it claims to do without fictions."[51] Tourtoulon's inability to relinquish this conceptual pacifier is peculiarly difficult to comprehend, in view of his acknowledgment that "[a] fiction . . . is only a juridical 'construction' like any other. . . . In any case, one must steer clear of the belief that a fictitious construction is opposed to a real one."[52]

This recalcitrance must be overcome. Existence of legal fictions is the ultimate fiction. Toleration of this concept generates confusion and the proliferation of paradoxes. It is improper, as well as erroneous, to distinguish between objective and subjective reality in the context of Law. For the Law recognizes only subjective facts, "created" by the "competent organ ascertaining" them[53] — objective facts exist, in Law, only to the extent that they are recognized so to exist.[54] Conversely, all that the Law recognizes to exist has legal reality. Thus, Tourtoulon's phrase, "juridical constructions,"[55] is the most appropriate one for all facts recognized as such in Law.

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[48] *Id.* at 64.

[49] Fuller, *supra* note 1, at 378.

> Conceivably we might eliminate the pretense from all our fictions; we might cease to say, "A is legally treated as if it were B," and simply say, "In a technical sense, A *is* B". . . . This attitude has, indeed, been dignified by a name — "the theory of the juristic truth of fictions."
>
> But it is clear enough that such a wholesale process of redefinition could not be carried out. One cannot introduce sweeping changes in linguistic usage by an arbitrary fiat.

[50] *See* note 42 *supra.*

[51] P. TOURTOULON, *supra* note 1, at 295.

[52] *Id.* at 391.

[53] H. KELSEN, *supra* note 44, at 135-36.

[54] *Id.*

[55] P. TOURTOULON, *supra* note 1, at 391. *Cf.* Fuller, *supra* note 1, at 908-09: "All of our facts . . . are conceptual facts . . . . Our language, our 'common sense' notions, our scientific theories, our legal constructs — all of these are conceptual devices for dealing with and simplifying reality. 'Facts' are only those thought-constructs which are useful for so many purposes and are so commonly accepted that no one doubts their 'existence' or 'reality' . . . . When we say that a fiction 'changes the facts to fit the theory', what we usually mean is that in adjusting our conceptual apparatus to accommodate a new situation, we have made the adjustment in a clumsy way and in the wrong place."

II. LEGAL CONCEPTUALISM — A PROCRUSTEAN INCUBUS

Common to all theories of the legal process is a quadripartite sequence:[56] First, the existence of facts is determined by the competent authority.[57] Second, this competent authority recognizes or determines the rules applicable to the facts as ascertained. These rules express legal concepts. Third, this competent authority applies these rules to the facts.[58] Fourth, this process of application produces legal consequences[59] — the attribution, or non-attribution, to a factual situation of the essential characteristics of the legal concepts formulated in the second stage of the legal process.

Legal consequences which realize these legal concepts are characterizable by the quality of legality — "the quality of being legal";[60] "conforming to the law; . . . required or permitted by law; . . . good and effectual in law . . . [p]roper or sufficient to be recognized by the law."[61]

Legal consequences which fail to realize these legal concepts, in any manner, are characterizable by the quality of illegality — "the quality of being illegal";[62] "contrary to law";[63] "not according to or authorized by, law."[64]

"Legality" and "illegality" are antonymous. Assertions that they coexist are, therefore, paradoxical. Yet the possibility of their coexistence is postulated by legal theory, which asserts that a factual situation may be characterized as illegal although it is treated as if it were legal.[65] This assertion occurs only where the inherent qualities of a legal concept are attributed to a factual situation which does not conform ideally to the conditions deemed requisite for realization of the concept. Elimination of this paradox is a two-step process. Acknowledgment that that which the competent authority

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[56] *See* BLACK'S LAW DICTIONARY (Law) (3d ed. 1933); 1 J. AUSTIN, *supra* note 8; W. FRIEDMANN, *supra* note 7; J. GRAY, *supra* note 1; H. HART, THE CONCEPT OF LAW (1961); H. KELSEN, *supra* note 44; H. KELSEN, WHAT IS JUSTICE? (1957).

[57] These facts, as so determined, correspond to the Aristotelean "material cause." WEBSTER'S NEW INT'L DICTIONARY 427 (Cause) (2d ed. unabr. 1937). "[T]he *material cause,* that which is to be wrought to this form, as the brick, timber, etc., of which the house is to be constructed."

[58] The process of application corresponds to the Aristotelean *efficient, or moving, cause,* "that which acts as the immediate agency for the production of the effect." WEBSTER'S NEW INT'L DICTIONARY 427 (Cause) (2d ed. unabr. 1937).

[59] These consequences correspond to the Aristotelean *final cause*: "that which is the end or object of the process." *Id.* (Cause (4)). They consist in either realization, or non-realization, of the *idea,* or legal concept, expressed in the rules determined in the second stage of this sequence.

[60] WEBSTER'S COLLEGIATE DICTIONARY 572 (Legality) (5th ed. 1946).

[61] BLACK'S LAW DICTIONARY 1085 (Legal) (3d ed. 1933). *See also* WEBSTER'S NEW INT'L DICTIONARY 1411 (Legal) (2d ed. unabr. 1937).

[62] WEBSTER'S COLLEGIATE DICTIONARY 496 (5th ed. 1946).

[63] BLACK'S LAW DICTIONARY 916 (3d ed. 1933).

[64] WEBSTER'S NEW INT'L DICTIONARY 1241 (2d ed. unabr. 1937).

[65] *See* pt. III *infra.*

recognizes as legal can be characterized *only* as legal,[66] is but half the battle. It remains to establish that that which the competent authority *treats* as legal, it *recognizes* as legal — that attribution of the qualities of a concept necessarily involves its realization.

Determination of what constitutes recognition of legality depends upon the meaning to be ascribed to "Law" in this context. Broadly speaking, the Law consists of the rules formulated in the second stage of the legal process.[67] The legal concepts expressed by these rules possess three aspects: (1) Each concept is an "idea" denominative of the meaning of the universal term which it represents.[68] (2) Each concept also is a schematism, establishing and classifying its constituents and the conditions requisite for their realization, as well as determining the extent to which its qualities must be attributed to each of its constituent classes.[69] These classes possess varying degrees of correspondence to the ideal form of the concept. (3) Finally, each concept comprises the essential attributes or inherent qualities of the idea whose meaning it represents.[70]

Since the schematic and qualitative aspects of legal concepts *are* correlative,[71] those factual situations, to which the essential attributes of these concepts are ascribed, must be presumed, conclusively, to meet their schematic requirements — *i.e.*, to realize them.[72] These factual situations thus conform to the law, and are

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[66] Pt. I *supra*; note 61 *supra.*

[67] *See, e.g.*, J. Salmond, as quoted in W. FRIEDMANN, *supra* note 7, at 219: "law consists of the rules recognized and acted on by the courts of justice."

[68] WEBSTER'S NEW INT'L DICTIONARY 552 (2d ed. unabr. 1937). [*E.g.*, the term *Corporation* designates the concept *corporateness.*] They are "the form or conception of that which is to be, as it exists ideally." *Id.* (Cause (1)) (defining the Aristotelean *formal cause*). In this context, ideas are either Platonic archetypes or patterns, or Aristotelean forms or form-giving causes. *Id.* at 1236 (Idea).

[69] *Id.* at 1236 (Idea); *see* Pattern, Form, Schema, Schematic, Schematism. The concept *corporateness* establishes three classes — *corporation, de facto corporation, corporation by estoppel* — specifies the circumstances which, in each case, require the attribution of the qualities of *corporateness,* and specifies the extent thereof.

[70] "[A]ll that is characteristically associated with, or suggested by" the generic term denominating the classes which it comprehends. *Id.* at 552 (Concept). "The ideal or intrinsic character of anything or that which imposes this character." WEBSTER'S COLLEGIATE DICTIONARY 394 (Form (3)) (5th ed. 1946). The concept *corporateness* comprehends the essential characteristics of the generic term *corporation.*

[71] Notes 68-70 *supra. Cf.* Hart, *Definition and Theory in Jurisprudence,* 70 LAW Q. REV. 37, 54 n.21 (1954): "It is also the explanation of the sense of a *tertium quid* between the 'facts' and the 'legal consequences' which troubles the analysis of many legal notions, *e.g.* status. The status of a slave is not (*pace* Austin) just a collective name for his special rights and duties: there is a sense in which these are the 'consequences' of his status . . . ."

[72] Notes 68-70 *supra. See also* Patterson, Introduction to Jurisprudence 96, 100 (4th mimeographed ed. 1951): "A complete legal norm is one which designates more or less precisely the legal consequences of operative facts." " 'When we state that some particular legal relation exists we are impliedly asserting the existence of certain facts. . . .' " *Id.*

sufficient to be recognized by the law.[73] In other words, attribution of the qualities of a concept constitutes recognition of legality. This attribution may be termed the consequences of legality, since it necessarily involves realization of the concept. These factual situations therefore must be characterized as legal,[74] even when they do not correspond to the conditions essential for realization of the conceptual class which most nearly approximates the concept. Conversely, no factual situation which is treated as legal — to which the consequences of legality are attributed — can be characterized as illegal.

Failure to recognize the reciprocal relation of the schematic and qualitative aspects of legal concepts results from the tautotypical nomenclature of these concepts — *i.e.,* ascription to a legal concept of a generic name identical with the specific name of one of its component classes.[75] This failure, in turn, causes the procrustean equation of the genus with its denominative species. Consequently, it is assumed that the characteristics, or inherent qualities, of a legal concept can be attributed to a factual situation which does not correspond to the conditions necessary for realization of the concept. For example, designation of the concept of "corporateness" by the specific appellation "corporation" results in a supposition that the whole is identical with one of its constituent parts, that factual situations do not fulfill the requirements of corporateness if they do not constitute a corporation. Yet, "corporation" is but one class of corporateness, albeit the one which corresponds most nearly to the schematic definition of the concept. Moreover, the attributes of corporateness *are* ascribed to factual situations which are not classifiable as corporations.

Temptation to attribute illegality to factual situations which are recognized as legal can be eliminated by adoption of a new system of conceptual nomenclature. This system should denominate legal concepts in qualitative terms which do not constitute tautotypes. Assuredly there is as much need for precision in the Law as in the natural sciences.[76]

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[73] *See* H. KELSEN, *supra* note 56; *See* authorities cited notes 68-70 *supra. Cf.* Hart, note 71, at 56: "If we put aside the question 'What is a corporation?' and ask instead 'Under what types of conditions does the law ascribe liabilities to corporations?' this is likely to clarify the actual working of a legal system."

[74] Notes 60, 61 *supra.*

[75] Invariably, the generic name applied to a legal concept is identical with the specific name of the class which possesses the highest degree of correspondence to the concept as a schematism.

[76] Identity of generic and specific names is forbidden by the International Code of Botanical Nomenclature. *See* WEBSTER'S NEW INT'L DICTIONARY 2586 (Tautonym, Tautotype) (2d ed. unabr. 1937).

III. THE DE FACTO DOCTRINE — EXEMPLIFICATION OF IDIOMATIC BIGOTRY

Many factual situations which give rise to the consequences of legality are characterized as illegal. They are described, *inter alia,* as *de facto,* voidable, legal by reason of res judicata or estoppel, constructive, or implied. *De facto* denotes "an officer, a government, a past action, or a state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate."[77] *De factoism* generally is justified in terms of public policy. "Voidable" signifies that which is "valid and effectual until . . . avoided by some act."[78] "Res judicata" and "estoppel" produce the consequences of legality by interdicting the assertion of facts preclusive of realization of the legal concept.[79] The basis for these doctrines is that a party should not be permitted to disavow his own conduct. "Constructive" and "implied" denote "that which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law."[80]

This terminology assumes three categories of juristic fact: "legal," "illegal," and "concurrently legal and illegal." The final category encompasses all circumstances designated as *de facto,* voidable, legal in consequence of res judicata or estoppel, constructive, or implied. It may be designated "legal illegality."

A. *Legal Illegality — the Dogma*

Legal illegality establishes the conditions which necessitate the ascription of the consequences of legality to factual situations which do not correspond to the schematism of the denominative class of the pertinent legal concept. It further identifies the persons who are precluded from controverting the attribution of the consequences of legality to these situations.

Legal illegality pervades the Law. It is, however, most conspicuous in connection with existence, or personality, and status. The most prominent examples of this paradox are associated with corporations, corporate officers and directors, public officers, legislatures, and divorce.

1. Corporations

"Corporation" is the *ne plus ultra* of legal tautotypes. Most tautotypical legal nomenclature is simple, consisting in the ascription to a legal concept of a generic name identical with the name

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[77] BLACK'S LAW DICTIONARY 513 (3d ed. 1933).

[78] *Id.* at 1822 (Void).

[79] *See* G. STUMBERG, CONFLICT OF LAWS: 112-14 (2d ed. 1951); WEBSTER'S NEW INT'L DICTIONARY (Estoppel) (2d ed. unabr. 1937).

[80] BLACK'S LAW DICTIONARY 413 (Constructive) (3d ed. 1933).

of one of its component species. "Corporation," however, is a complex tautotype — a generic name identical both with the name of one of its component species *and* with the name of one of its component *sub*-species. To wit, "corporation" properly is the name of but one of the species of the specific legal concept of "corporateness," which, in turn, is but one of the species of the generic legal concept of "artificial personality." Yet, as a general rule, it is presumed that the genus, the species, and the sub-species are mutually identical. Hence, the qualities of both "artificial personality"[81] and "corporateness"[82] commonly are deemed attributable, strictly, only to those factual situations which constitute corporations. In this context, a "corporation" properly is considered to exist only if (1) incorporation has been accomplished pursuant to statute;[83] and (2) the resultant institution is an entity distinct from its constituent human beings, both as to the latter and as to third parties,[84] possessing at least the following powers, rights, and capacities:

> 1. To have perpetual succession . . . . 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors . . . . 4. To have a common seal . . . . 5. To make by-laws or private statutes for the better government of the corporation . . . .[85]

Although considerations of public policy necessitate exceptions to the rule, these exceptions customarily are characterized as illegal, notwithstanding the ascription to them, for certain purposes, of the qualities of artificial personality or corporateness.[86] These exceptions fall into two categories. The first encompasses those institutions which, although neither incorporated nor claiming to be corporations, are treated, for certain purposes, as entities distinct from

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[81] *See* 1 BLACKSTONE, COMMENTARIES *123, *467; L. GOWER, PRINCIPLES OF MODERN COMPANY LAW 62, 68, 228-29 (1954); LLOYD, LAW OF UNINCORPORATED ASSOCIATIONS (1938); F. MAITLAND, *The Corporation Sole, The Unincorporate Body, Trust and Corporation, Moral Personality and Legal Personality*, in SELECTED ESSAYS (1936); WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 10-12 (1929). Warren, for example, states: "According to Blackstone, ... A legal unit was either a natural person or it was not. If it was not, the proper name for it was corporation." WARREN, *supra* at 10. Similarly, "[p]ersons are either natural or artificial. The only natural persons are men. The only artificial persons are corporations." F. MAITLAND, *supra* at 73. And, likewise: "We in England say that persons are natural or artificial, and that artificial persons are corporations aggregate or corporations sole." *Id.* at 136.

[82] *See* H. BALLANTINE, MANUAL OF CORPORATION LAW AND PRACTICE §§ 19, 21-27 (1930); R. STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS §§ 26-29 (2d ed. 1949).

[83] Authorities cited note 82 *supra.*

[84] *See* Liverpool Ins. Co. v. Massachusetts, 77 U.S. (10 Wall.) 566 (1870); LLOYD, *supra* note 81, at 15-18.

[85] 1 BLACKSTONE, COMMENTARIES **475-76.

[86] *See, e.g.*, H. BALLANTINE, *supra* note 82; W. FRIEDMANN, LAW IN A CHANGING SOCIETY 263 (Penguin ed. 1964); L. GOWER, *supra* note 81, at 234-36; R. STEVENS, *supra* note 82.

their constituent human beings, because they rightfully possess one or more of the powers, rights, and capacities "necessarily and inseparably incident to every corporation."[87] These institutions all are species of the generic legal concept "artificial personality," of which "corporation" is the tautonym. They have been referred to, *inter alia,* as "*de facto* legal persons."[88] The second category encompasses those associations which are treated, for certain purposes, as the corporations which they claim to be, although they are neither incorporated, nor rightfully possess any inherently corporate powers, rights, or capacities. These associations are species of the specific legal concept "corporateness." Consequently, they are sub-species of the generic legal concept "artificial personality." They have been referred to as *de facto* corporations, or as corporations by estoppel.

a. "Artificial Personality" — *De facto* Legal Persons

According to orthodox theory, "artificial personality" is a monobasic concept, of which "corporation" is the solitary species. This theory derives from the unfortunately deathless prose of Blackstone, who stated:

> Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.[89]

Consequently, it commonly is considered that the only *de jure* artificial legal persons are *de jure* corporations.[90]

Yet, in many instances, institutions which rightfully possess one or more inherently corporate powers, rights, or capacities, are treated, for certain purposes and to a more or less limited extent, as legal persons — entities distinct from their constituent human beings — although they neither are incorporated nor claim to be *de jure* corporations.[91] Thus, unincorporated institutions which, by virtue of the law of the place of their creation, possess all of the inherently corporate powers, rights, and capacities, have been treated elsewhere as corporations.[92] Furthermore, unincorporated institu-

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[87] 1 BLACKSTONE, COMMENTARIES *475.

[88] *See* W. FRIEDMANN, *supra* note 86, at 263.

[89] 1 BLACKSTONE, COMMENTARIES *123.

[90] *See* note 81 *supra.*

[91] *See* G. BOGERT, TRUSTS AND TRUSTEES § 712 (2d ed. 1960); L. GOWER, *supra* note 81, at 234-36; LLOYD, *supra* note 81, at 17-18, 48-49, 59, 89, 98-99, 157-58, 221-22.

[92] English joint stock association treated as *corporation* for purposes of Massachusetts taxing statute, Liverpool Ins. Co. v. Massachusetts, 77 U.S. (10 Wall.) 566 (1870). Michigan limited partnership treated as *corporation* for purposes of California's regulatory legislation, Hill-Davis Co. v. Atwell, 215 Cal. 444, 10 P.2d 463 (1932). *Massachusetts trusts* treated as corporations for purposes of the forum's regulatory legislation, Hamilton v. Young, 116 Kan. 128, 225 P. 1045 (1924); State *ex rel.* Colvin v. Paine, 137 Wash. 566, 243 P. 2 (1926).

tions have been treated, at the place of their creation, as non-corporate entities, distinct from their constituent human beings, to the extent of the inherently corporate powers, rights, and capacities which they rightfully possess, and those which they properly may be inferred to possess. Among the unincorporated institutions which have been so treated are partnerships,[93] limited partnerships,[94] joint stock companies,[95] labor or trade unions,[96] friendly societies,[97] Massachusetts or business trusts,[98] trustees or trust estates,[99] and other unincorporated institutions.[100] This treatment, however, generally is accorded only insofar as third persons are concerned, *not* insofar as the entity's constituent human beings are concerned.[101] However, it has been held that a member of a registered trade union can sue it for breach of contract;[102] that a statutory limited partnership can hire one of its members as an ordinary employee;[103] and that an ordinary partnership can contract with one of its members.[104]

The entitative treatment of non-corporations constitutes a practical judicial recognition of the jurisprudential theory that "artificial personality" is, in fact, a polybasic concept, comprising every entity to which, in its capacity as such entity, the law attributes rights and

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[93] Fitzgerald v. Grimmell, 64 Iowa 261 (1884); Lobato v. Paulino, 304 Mich. 668, 8 N.W.2d 873 (1943); Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); *In re* Estate of Zents, 148 Neb. 104, 26 N.W.2d 793 (1947); Roop v. Herron, 15 Neb. 73, 17 N.W. 353 (1883); Finston v. Unemployment Compensation Commission, 132 N.J.L. 276, 39 A.2d 697 (1944), *aff'd*, 134 N.J.L. 232, 46 A.2d 734 (1946); Whitman v. Keith, 18 Ohio St. 134 (1868); Walker v. Wait, 50 Vt. 668 (1878). *See also* Mason v. Mitchell, 135 F.2d 599 (9th Cir. 1943); Park v. Union Mfg. Co., 45 Cal. App. 2d 401, 114 P.2d 373 (1941); *In re* Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941).

[94] Carle v. Carle Tool & Engineering Co., 36 N.J. Super. 36, 114 A.2d 738 (1955).

[95] Walker v. Wait, 50 Vt. 668 (1878).

[96] Bonsor v. Musician's Union, [1956] A.C. 104; The Taff Vale Ry. Co. v. The Amalgamated Society of Ry. Servants, [1901] A.C. 426; National Union of General and Municipal Workers v. Gillian, [1946] K.B. 81 (C.A. 1945), *aff'g* [1945] 2 All E.R. 593 (K.B.); Bonsor v. Musician's Union, [1954] 2 W.L.R. 687 (C.A.).

[97] L. GOWER, *supra* note 81, at 234-36; LLOYD, *supra* note 81, at 59.

[98] Wagner Oil and Gas Co. v. Marlow, 137 Okla. 116, 278 P. 294 (1929). *See also* Hamilton v. Young, 116 Kan. 128, 225 P. 1045 (1924).

[99] Tuttle v. Union Bank & Trust Co., 112 Mont. 568, 119 P.2d 884 (1941); CONN. G.S.A. § 52-202 (1958); MONT. R.C. ANN. § 86-507 (1947); NO. DAK. CENT. CODE § 59-02-10 (1960); OKLA. STAT. ANN. tit. 60, § 174 (1961); PA. STAT. ANN. tit. 20, § 320.939 (Purdon 1950); R.I.G.L. § 9-2-9 (*as amended* 1965); S.D. CODE § 59.0209 (1939); G. BOGERT, *supra* note 91, § 712.

[100] Hamner v. B. K. Bloch & Co., 16 Utah 436, 52 P.770 (1898); Morrison v. Standard Bldg. Soc'y, [1932] S. Afr. L.R. 229 (App. Div.).

[101] Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); Bonsor v. Musician's Union, [1954] 2 W.L.R. 687 (C.A.). *See also* Park v. Union Mfg. Co., 45 Cal. App. 2d 401, 114 P.2d 373 (1941); Hamilton v. Young, 116 Kan. 128, 225 P. 1045 (1924); Adams Express Co. v. Schofield, 111 Ky. 832, 64 S.W. 903 (1901); Finston v. Unemployment Compensation Comm'n, 132 N.J.L. 276, 39 A.2d 697 (1944); *In re* Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941).

[102] Bonsor v. Musician's Union, [1956] A.C. 104, *rev'g* [1954] 2 W.L.R. 687 (C.A.).

[103] Carle v. Carle Tool & Eng'r Co., 36 N.J. Super. 36, 114 A.2d 738 (1955).

[104] Walker v. Wait, 50 Vt. 668 (1878).

duties.[105] Hence, the sole criterion of legal personality is entitativeness — a legal person is that which the law treats as a unit, even if it be so treated only with respect to a single right or duty.[106] Consequently, "the difference between natural and artificial persons is irrelevant, since all legal personality is artificial and derives its validity from superior norms."[107] The quantum of rights and duties attributed to an entity also is irrelevant,[108] as are its composition,[109] its form,[110] and the manner of its creation.[111]

Yet, only rarely is a non-corporate entity characterized as legal — as a "legal entity," or *"persona juridica,"* in its own right.[112] Generally, such entities, although treated as legal, are characterized as illegal because of their "non-corporate" status. To wit, they commonly are characterized as "quasi-corporations,"[113] "quasi-persons,"[114] "near-corporations,"[115] or "*de facto* legal persons."[116]

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[105] A. KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 277-85 (1930); A. NEKAM, *supra* note 46; J. SALMOND, *supra* note 7, §§ 108, 113; Smith, *Legal Personality*, 37 YALE L.J. 283 (1928). Smith, for example, states: "To be a legal person is to be the subject of rights and duties. To confer legal rights or to impose legal duties, therefore, is to confer legal personality." Smith, *supra* at 283. Similarly, Kocourek states: "A legal person is a conceptual point of reference created by the the law for the attribution of rights and ligations." A. KOCOUREK, *supra* at 283.

[106] A. KOCOUREK, *supra* note 105; A. NEKAM, *supra* note 46; Smith, *supra* note 105, at 289. *Cf.* J. SALMOND, *supra* note 7, at 337. Nékam, for example, states: "[T]here exists a gradation among the legal entities which extends from those which are considered as such for the purpose of a single right only to those which have a great number of rights attributed to them." A. NEKAM, *supra* at 45.

[107] W. FRIEDMANN, *supra* note 7, at 233 (expounding Kelsen's pure theory of law). *Accord*, J. SALMOND, *supra* note 7, at 329. "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man." *Id.*

[108] A. KOCOUREK, *supra* note 105; A. NEKAM, *supra* note 46; Smith, *supra* note 105, at 289.

[109] Although legal personality commonly is considered to be a possible attribute only of an individual, or of an entity representing a group of individuals, it also can be predicated of an individual acting in a dual or multiple capacity, with the result that the individual possesses a dual or multiple legal personality. *See, e.g.*, BOGERT, *supra* note 91, § 712. It even can be predicated of property — such as a fund *consecrated to a specific purpose.* LLOYD, *supra* note 81, at 48-49. *See also* W. FRIEDMANN, *supra* note 7, at 511-29.

[110] *See, e.g.*, Smith, *supra* note 105, at 289.

[111] *Id.*

[112] Bonsor v. Musician's Union, [1956] A.C. 104, 149-50 (opinion of Lord Keith of Avonholm); National Union of Gen. and Municipal Workers v. Gillian, [1945] 2 All E.R. 593, 600, 602 (K.B.), *aff'd*, [1946] K.B. 81, 84-86 (C.A. 1945) (opinion of Scott, L.J.).

[113] Hill-Davis Co. v. Atwell, 215 Cal. 444, 10 P.2d 463 (1930); Adams Express Co. v. Schofield, 111 Ky. 832, 64 S.W.2d 903 (1901); Carle v. Carle Tool & Engineering Co., 36 N.J. Super. 36, 114 A.2d 738 (1955); LLOYD, *supra* note 81, at 59, 89, 98-99.

[114] *In re* Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941); LLOYD, *supra* note 81, at 157-58.

[115] National Union of Gen. and Municipal Workers v. Gillian, [1946] K.B. 81, 87-88 (C.A. 1945) (opinion of Uthwatt, J.); Bonsor v. Musician's Union, [1954] 2 W.L.R. 687, 705 (C.A.) (opinion of Evershed, M.R.).

[116] W. FRIEDMANN, *supra* note 86, at 263.

b. "Corporateness" — *De facto* and by Estoppel

Corporations *de facto* and by estoppel are unincorporated associations which are treated, for certain purposes, as if they are *de jure* corporations. They differ in three respects from the other non-corporations which are accorded entitative treatment. First, they assume corporate status. Second, they do not rightfully possess any inherently corporate powers, rights, or capacities. And, third, for the purposes for which they are considered as entities, they are so considered to the same extent as is a *de jure* corporation.

The *de facto* corporation is a judicially-created concept. It is deemed to exist where there is a statute under which incorporation might have been had; a real, but insufficient, attempt to comply with the statute; and an exercise of corporate privilege.[117] In some instances, it has received legislative sanction.[118] As a general rule, the existence of a *de facto* corporation is not dependent upon the existence of an estoppel.[119]

The considerations of public policy which have engendered the *de facto* corporation consist in the protection of third persons, and the public, who deal, or might deal, with the persons purporting to represent a corporation.[120] This policy has given rise to the controversy as to whether an unconstitutional statute can be the foundation for a *de facto* corporation.

The basis of the requirement that there must be a statute authorizing creation of a corporation is that the "consent of the state is absolutely necessary to the creation of any corporation and must be expressly or impliedly given."[121] For purposes of the *de facto* doctrine, this consent is deemed to be given by a statute authorizing

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[117] H. BALLANTINE, *supra* note 82, §§ 19, 23; R. STEVENS, *supra* note 82, § 27.

[118] *See, e.g.,* IDAHO CODE § 30-114 (1949); 32 ILL. STAT. ANN. § 157.49 (Smith-Hurd 1954); 20 MINN. STAT. ANN. § 301.08 (1946); N.Y. BUS. CORP. LAW § 403 (McKinney 1963), *as amended* (1967); OKLA. STAT. ANN. tit. 18, § 1.14(c) (1941); PA. STAT. ANN. tit. 15, § 2852-207 (Purdon 1967); S.C. CODE LAWS tit. 12, § 12-62 (1962); S.D. CODE, § 11.0108 (1939); REV. CODE WASH. ANN. § 23A.12.040 (1961) (add. 1965, eff. July 1, 1967); ENGLISH COMPANIES ACT 19 & 20 Geo. 5, ch. 23, § 15-(1) (1929); R. STEVENS, *supra* note 82, § 29.

[119] Society Perun v. Cleveland, 43 Ohio St. 481, 3 N.E. 357 (1885); H. BALLANTINE, *supra* note 82, § 23. *Contra,* R. STEVENS, *supra* note 82, § 29.

[120] H. BALLANTINE, *supra* note 82, §§ 19, 22; R. STEVENS, *supra* note 82, § 29. Ballantine observes,

> The recognition of *de facto* corporate existence when the conditions precedent to incorporation have not been substantially complied with is founded on public policy and practical convenience. It is essential to the safety of business transactions with corporations. It would endanger the rights of corporations and of those dealing with them if questions could be raised as to irregularities in incorporation, in cases in which such questions have no just bearing on the transaction involved.

H. BALLANTINE, *supra* at 70.

[121] H. BALLANTINE, *supra* note 82, § 19, at 68. *See also id.* §§ 21, 22; R. STEVENS, *supra* note 82, § 29.

de jure formation of the *de facto* corporation.[122] Consequently, it frequently is held that "there cannot be a corporation *de facto* under a statute which is unconstitutional, for an unconstitutional statute is absolutely void . . . is the same in effect as no law at all, even if associates organize in good faith in reliance on it."[123] Ballantine has observed:

> The fundamental principle is that the state controls the formation of corporations by statute. If the state has not authorized or consented to the formation of such a corporation, it is a different case than where the state has authorized it upon certain conditions and formalities and the associates have attempted to comply but have fallen into some irregularity in their proceedings.[124]

Cases holding that an unconstitutional statute can constitute the foundation for a *de facto* corporation, acknowledge that the consent of the state is essential to *de facto* corporate existence.[125] They assert, however, that an unconstitutional statute is as evidentiary of consent as a constitutional one.[126] The real basis of decision, however, is that "[e]ven though the statute be unconstitutional, the ethical considerations are the same as in those cases where all the elements are present . . . ."[127] No case has been found which attributes the qualities of corporateness to an alleged corporation whose organization was attempted subsequent to the determination of unconstitutionality.

Recognition of *de facto* corporateness generally is phrased in terms of liability of its purported *de jure* status to attack. Thus, a *de facto* corporation invariably is subject to direct attack only in proceedings brought by the State to "question the right of an association to be a corporation, and to oust it from the exercise of corporate powers."[128] The same result obtains where there is legislative sanction for *de facto* corporations.[129] The general rule, however, is that *de facto* corporations never are subject to collateral attack.[130] This is true irrespective of whether the party seeking to make the collateral attack is an individual or the State.[131].

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[122] H. BALLANTINE, *supra* note 82, § 19. *See also id.* §§ 21, 22; R. STEVENS, *supra* note 82, § 29.

[123] H. BALLANTINE, *supra* note 82, § 21, at 74. *See also* R. STEVENS, *supra* note 82, § 27.

[124] H. BALLANTINE, *supra* note 82, at 74.

[125] *Id.* § 21.

[126] *Id.*

[127] R. STEVENS, *supra* note 82, at 144.

[128] H. BALLANTINE, *supra* note 82, at 67.

[129] *See* note 118 *supra.*

[130] H. BALLANTINE, *supra* note 82, §§ 19, 22, 23, 26; R. STEVENS, *supra* note 82, §§ 26, 27, 29. *See* material cited note 118 *supra.*

[131] H. BALLANTINE, *supra* note 82, §§ 19, 22, 23, 26; R. STEVENS, *supra* note 82, §§ 26, 27, 29. *See* material cited note 118 *supra.*

Only rarely is a *de facto* corporation characterized as "legal." It has been asserted that "[a] *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, *a corporation.*"[132] Ballantine has stated that "a corporation *de facto* has an *actual* existence, and *is a corporation* in contemplation of the law, as against every person except the state, and even as against the state except in a direct proceeding to question its corporate existence."[133] Yet both quotations tenaciously describe such corporations as *de facto* — illegal, but treated as legal. Stevens, moreover, observes that "the fact that there are still deviations from this general rule supports the contention that decisions are reached by applying a *de facto* doctrine rather than by recognizing the existence of a *de facto* corporation."[134]

Corporations by estoppel constitute a very limited exception to the principle that the qualities of "corporateness" shall be attributed only to "corporations." Unlike *de facto* corporations, which have been said to have "an actual and substantial legal existence,"[135] corporations by estoppel uniformly are characterized as illegal.[136] So, it has been said:

> The doctrine of "corporation by estoppel" does not involve a recognition that an irregular corporation has acquired the corporate status generally. It only considers the legal consequences of a particular transaction done in the corporate name by associates assuming to be a corporation and dealt with as such by the other party. The *de facto* doctrine on the other hand, by excluding collateral attack for various irregularities, on grounds of public policy and more convenient remedies, in effect recognizes the acquisition of a corporate status.[137]

Neither complete absence of a statute under which incorporation could be had, nor the unconstitutionality of such a statute, if existent, can prevent the creation of a corporation by estoppel.[138] For, "a corporation by estoppel is not based on statutory authorization."[139] Rather, it is based upon conduct. The doctrine requires denial of collateral attack upon the corporate existence *only* in the particular litigation, as between the parties thereto.[140] As in the

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[132] Society Perun v. Cleveland, 43 Ohio St. 481, 490, 3 N.E. 357, 360 (1885).

[133] H. BALLANTINE, *supra* note 82, at 78. *Id.* §§ 25, 26, 27.

[134] R. STEVENS, *supra* note 82, at 169-70. *See also* Eaton v. Aspinwall, 19 N.Y. 119 (1859).

[135] H. BALLANTINE, *supra* note 82, at 85.

[136] *Id.* §§ 21, 27.

[137] *Id.* at 90-91.

[138] *Id.* § 21.

[139] *Id.* at 72-73.

[140] *Id.* § 27.

case of *de facto corporations,* corporations by estoppel have received legislative sanction.[141]

2. Corporate Officers and Directors

Persons who act as corporate officers and directors have a legal status distinct from their status as individuals.[142] The essential characteristics of corporate officers and directors properly are attributable only to those persons who comply, in every respect, with the conditions requisite to investment with such legal status.[143] Public policy, however, is deemed to require deviations from this principle.[144] As in the case of corporations, these exceptions are denominated illegal, despite the attribution to them of the qualities possessed by corporate officers and directors.[145] Also, akin to the corporateness situation, is the division of exceptions into those based on a *de facto* doctrine and those arising out of an estoppel.[146]

De facto corporate officers and directors are those persons who are in actual possession of the offices which they claim to hold, and actually exercise their functions and discharge their duties, under claim and color of right, with the consent of the corporation, but who are illegally, or irregularly, elected or appointed.[147] "A person who has not the qualifications for office prescribed by the charter or statute is not strictly a *de facto* officer . . . . "[148]

The *de facto* doctrine "exists for the protection of the innocent."[149] It evolves from the assumption that

> "third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question."[150]

Recognition of the *de facto* status of persons claiming to be corporate officers or directors is couched in terms of the circum-

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[141] R. STEVENS, *supra* note 82, § 29. *See, e.g.,* DEL. CODE ANN. tit. 8, § 329 (1953); FLA. STAT. ANN. tit. 18, § 608.50 (1955); GA. CODE ANN. tit. 22, § 22-714 (1966); TENN. CODE ANN. § 48-711 (1964). *See also* MINN. STAT. ANN. tit. 20, § 301.08 (1946).

[142] *See* H. BALLANTINE, *supra* note 82, §§ 126, 127; R. STEVENS, *supra* note 82, § 160.

[143] *See* H. BALLANTINE, *supra* note 82, §§ 126, 127; R. STEVENS, *supra* note 82, § 160.

[144] *See* H. BALLANTINE, *supra* note 82, §§ 126, 127; R. STEVENS, *supra* note 82, § 160.

[145] *See* H. BALLANTINE, *supra* note 82, §§ 126, 127; R. STEVENS, *supra* note 82, § 160.

[146] H. BALLANTINE, *supra* note 82, § 126.

[147] *Id.* § 126; R. STEVENS, *supra* note 82, § 160.

[148] H. BALLANTINE, *supra* note 82, at 399-401.

[149] R. STEVENS, *supra* note 82, at 744.

[150] *In re* Ringler & Co., 204 N.Y. 30, 42-43, 97 N.E. 593, 597 (1912). *See also* H. BALLANTINE, *supra* note 82, § 126.

stances under which the qualities inherent in this status, *de jure*, will be ascribed to these persons. Thus, the official acts of *de facto* corporate officers and directors, are, insofar as third persons are concerned, as valid and binding upon these officers and directors, and the corporation which they claim to represent, as if the *de facto* officers and directors were *de jure*.[151] Nor can *de facto* corporate officers or directors deny the *de jure* character of their status, as against the corporation or its creditors, in order to escape liability for their official acts.[152] Except, however, where the issue involves the possible liability of the *de facto* officers to the corporation, the *de facto* doctrine does not apply as between the *de facto* corporate officers or directors and the corporation or its stockholders.[153] Nor can rights dependent upon *de jure* existence as a corporate officer or director be enforced by one whose status is *de facto* — *e.g.*, claims for salary.[154] For the *de facto* doctrine does not operate to benefit the *de facto* entity.

The doctrine of *de facto* corporate officers and directors has been described as a legal fiction.[155] The assertion further has been made that "the doctrine of de facto directors does not have the effect of constituting one a director or officer, even in fact. The doctrine expresses only a principle, intended to effect justice between the parties in each particular case."[156]

Status by estoppel is more limited in scope than the *de facto* doctrine.[157] It attributes the consequences of legality to circumstances which do not fulfill the requirements of the *de facto* doctrine.[158] It exists only as between parties who have dealt with each other on the supposition that the person holding himself out to be a corporate officer or director has that status *de jure*. And, it operates only to prevent the would-be corporate officer or director from denying his status *de jure* in the particular litigation.

3. Public officers

Persons who act as public officers, like those who act as corporate officers and directors, possess dual legal status, *i.e.*, their status *qua* public officers is distinct from their status *qua* individuals. In common with corporations, and with corporate officers and direc-

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[151] H. BALLANTINE, *supra* note 82, § 126; R. STEVENS, *supra* note 82, § 160.

[152] H. BALLANTINE, *supra* note 82, § 126.

[153] *Id.*

[154] *Id.*

[155] *In re* Ringler & Co., 204 N.Y. 30, 44, 97 N.E. 593, 598 (1912). "The classification, as we have seen, is merely a legal fiction which the law invokes for the protection of third persons and the public." *Id.*

[156] R. STEVENS, *supra* note 82, at 746.

[157] *Id.* at 744.

[158] H. BALLANTINE, *supra* note 82, § 126.

tors, public officers, if, and only if, constituted as such by exact compliance with specified conditions, inherently possess the qualities characteristic of public officers. Public policy requires, and permits, but one exception to this rule.[159] Like the remainder of public policy's posterity, it is a species of the genus *de facto,* and is characterized as illegal, although treated as legal.[160] Unlike them, however, it conceals a doctrine of generalized estoppel beneath the mask of *de factoism.*[161]

A *de facto* public officer "is one who has the reputation or appearance of being the officer he assumes to be but who, in fact, under the law, has no right or title to the office he assumes to hold."[162] Prerequisite to the existence of a *de facto* public officer are possession of the office, under color of right or title thereto, and exercise of the franchise of the office.[163] There is serious doubt as to whether existence of a *de facto* public officer is possible in the absence of a corresponding office *de jure.*[164] The orthodox approach is that "under a constitutional government there can be no such thing as an office *de facto,* as distinguished from an officer *de facto.* Hence, the general rule that the acts of an officer *de facto* are valid, has no application where the office itself does not exist."[165] The conflict between this principle, and the public policy on which

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[159] E. MCQUILLIN, MUNICIPAL CORPORATIONS §§ 12.102, 12.103, 12.106 (3d ed. rev. 1963).

[160] *Id.* § 12.106.

[161] *Id.*

[162] *Id.* at 435-36.

[163] *Id.* § 12.102; Note, *The De Facto Officer Doctrine,* 63 COLUM. L. REV. 909 (1963); 17 N.Y.U.L. REV. 300 (1939-1940).

[164] Norton v. Shelby County, 118 U.S. 425 (1886); State v. Carroll, 38 Conn. 449, 9 Am.R. 409 (1871); Michigan City v. Brossman, 105 Ind. App. 259, 11 N.E.2d 538 (1937); Hildreth's Heirs v. McIntire's Devisee, 24 Ky. (1 J. J. Marsh.) 206, 19 Am.Dec. 61 (1829); State v. Poulin, 105 Me. 224, 74 A. 119 (1909); Lang v. Mayor of Bayonne, 74 N.J.L. (45 Vroom) 455, 68 A. 90 (1907); Gwynne v. Board of Educ., 259 N.Y. 191, 181 N.E. 353 (1932); E. MCQUILLIN, *supra* note 159, § 12.104; *The De Facto Officer Doctrine, supra* note 163; *The Validity of Acts of Officers Occupying Offices Created Under Laws Declared Unconstitutional,* 3 U. NEWARK L. REV. 123 (1938); 29 MINN. L. REV. 36 (1944-1945); 86 U. PA. L. REV. 551 (1937-1938).

[165] E. MCQUILLIN, *supra* note 159, at 444. *See also* Norton v. Shelby County, 118 U.S. 425 (1885); Hildreth's Heirs v. McIntire's Devisee, 24 Ky. (1 J.J. Marsh.) 206, 19 Am.Dec. 61 (1829); *The De Facto Officer Doctrine, supra* note 163; *The Validity of Acts of Officers Occupying Offices Created Under Laws Declared Unconstitutional,* 3 U. NEWARK L. REV. 123 (1938); 29 MINN. L. REV. 36 (1944-1945); 86 U. PA. L. REV. 551 (1937-1938). In Norton v. Shelby County, *supra,* the leading exponent of the orthodox view, it was stated at 442:

> Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent . . . . An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

the doctrine of *de facto* public officers is based, has resulted in its denial in many jurisdictions,[166] and its modification in others.[167]

Acknowledgment of the existence of *de facto* public officers is motivated by a desire to "preserve the rights of third persons and the organization of society."[168] It is a "matter of recognized necessity to protect the rights of the public and individuals involved in the official acts of persons exercising the duties of, and occupying offices under color of law."[169] Although it is the interests of the public, *not* the interests of the State, which are intended to be protected, it has been observed that "[w]ariness on the part of the general public of the authority of public officers would seriously interfere with the efficient administration of the government and therefore the public is encouraged to deal in confidence with them."[170]

In the case of public officers, public policy has generated a doctrine nominally *de facto,* the intrinsic character of which is generalized estoppel. That is to say, it is based upon justifiable conduct, in reliance on the existence, as true, of a state of facts. Substantiation of this theory is to be found in the reasoning behind the validation of acts of public officers, exercising the duties of their offices pursuant to unconstitutional statutes, when such acts are performed prior to the declaration of unconstitutionality.[171] Furthermore, the authority of a *de facto* public officer is asserted to be

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[166] State v. Carroll, 38 Conn. 449, 9 Am.R. 409 (1871); Michigan City v. Brossman, 11 N.E.2d 538 (Ind. App. 1937); State v. Poulin, 105 Me. 224, 74 A. 119 (1909); Lang v. Mayor of Bayonne, 74 N.J.L. 455, 68 A. 90 (1907); E. McQUILLIN, *supra* note 159, §§ 12.104, 12.106; *The De Facto Officer Doctrine, supra* note 163; 29 MINN. L. REV. 36 (1944-1945); 3 U. NEWARK L. REV. 123 (1938); 86 U. PA. L. REV. 551 (1937-1938).

[167] *The De Facto Officer Doctrine, supra* note 163; 86 U. PA. L. REV. 551 (1937-1938).

[168] E. McQUILLIN, *supra* note 159, at 448-53.

[169] 3 U. NEWARK L. REV. 123, 124-25 (1938). *See also* State v. Carroll, 38 Conn. 449, 9 Am.R. 409 (1871); State v. Poulin, 105 Me. 224, 74 A. 119 (1909); 29 MINN. L. REV. 36 (1944-1945).

[170] 17 N.Y.U.L. REV. 300 (1939-1940).

[171] Thus, it has been stated:

> Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and if thought unconstitutional resisted, but must be received and obeyed, as to all intents and purposes law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society.

State v. Carroll, 38 Conn. 449, 472, 9 Am.R. 409 (1871). *See also* State v. Poulin, 105 Me. 224, 74 A. 119 (1909).

Coexistent with this principle is that which denies absolute retroactivity to a declaration of unconstitutionality:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration .... [A]n all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940). *See also* Linkletter v. Walker, 381 U.S. 618 (1965); material cited *supra* note 166.

founded in reputation.[172] More explicitly, it has been observed that "the reason for validating the acts of a *de facto* officer does not exist if the public and third persons are aware of defects in the officer's title and are not deceived thereby."[173] This constitutes a clear-cut departure from the nature of the *de facto* doctrines laid down with respect to corporateness and corporate officers and directors. For, genuine *de factoism* is *not* dependent upon the existence of an estoppel.

Non-existence of a distinct category of "public officers by estoppel" results from the fact that the doctrine of *de facto* public officers is intrinsically one of estoppel. Persons who assume to act as public officers thus must be classified either as "*de jure* public officers," or "*de facto* public officers," or as usurpers.[174]

In common with the *de facto* doctrines pertaining to "corporateness" and corporate officers and directors, the doctrine of *de facto* public officers is framed in terms of the circumstances under which the inherent characteristics of the entity, *de jure,* will be attributed to persons erroneously claiming to be such entities. The status of one who claims to be a public officer, for example, is stated to be subject, at all times, to direct attack by the State, or by private persons acting in the name of the State.[175] A *de facto* officer, moreover, is not permitted to obtain personal benefit from his *de facto* status.[176] Hence, his title may be assailed directly when "he seeks to enforce a perquisite, such as salary, appendant to the office, or when he raises a privilege, such as judicial immunity, in a proceeding brought against him personally."[177]

As a general rule, however, the status of a person acting as a public officer is not subject to collateral attack, unless he is a usurper.[178] The rule applies irrespective of whether the collateral attack is made by "the public or by private parties seeking to challenge the officer's action or exercise of jurisdiction, whether that

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[172] E. MCQUILLIN, *supra* note 159, § 12.102; *The De Facto Officer Doctrine, supra* note 163, at 912.

[173] E. MCQUILLIN, *supra* note 159, at 451. *See also* State v. Carroll, 38 Conn. 449, 467, 9 Am.R. 409 (1871); *The De Facto Officer Doctrine, supra* note 163, at 913 ("... appearance of right to the office requires that the public be unaware of the defect in the officer's authority.").

[174] E. MCQUILLIN, *supra* note 159, §§ 12.102, 12.103; *The De Facto Officer Doctrine, supra* note 163.

[175] Gwynne v. Board of Education, 259 N.Y. 191, 181 N.E. 353 (1932); Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Effect on Official Status,* 13 MINN. L. REV. 439, 441 (1928-1929); *The De Facto Officer Doctrine, supra* note 163, at 909-10. *See also* E. MCQUILLIN, *supra* note 159, §§ 12.102, 12.106.

[176] E. MCQUILLIN, *supra* note 159, § 12.106 at 453; *The De Facto Officer Doctrine, supra* note 163.

[177] *The De Facto Officer Doctrine, supra* note 163, at 909-10.

[178] *Id.* at 909-12.

challenge is in an independent proceeding or in the pending litigation."[179]

Recently, however, the doctrine of absolute immunity of *de facto* public officers from collateral attack upon their status has been eroded.[180] Thus it has been held that the status of judges may be attacked collaterally when the alleged defect in authority affects the jurisdiction of courts.[181] Such collateral attack may be made upon trial,[182] upon direct appeal[183] or in the course of a collateral attack upon the judgment.[184]

De facto public officers uniformly are characterized as illegal.[185] It has been asserted that "[o]ffice holding *de facto* is a fiction of the law designed to serve a useful purpose, but the fiction does not abolish the law. A *de facto* officer is not an officer although his acts may have legal effect."[186] It also has been stated that the *de facto* doctrine expresses not "any quality or character *conferred upon the officer,* or attached to him by reason of any defective election or appointment, but a name or character given to his acts by the law, for the purpose of validating them."[187] In this respect, therefore, the doctrine of *de facto* public officers conforms to that of *de facto* corporate officers and directors.

4. Legislatures

Legislatures are juristic entities, possessed of legal personalities separate and distinct from the personalities of their component legislators, irrespective of whether the latter are considered in their capacities as public officers, or as individuals.[188] Strictly speaking, the intrinsic characteristics of legislatures are attributable only to those bodies which constitute legislatures *de jure*.[189] Yet, as so frequently happens in connection with legal concepts, attempts at realization of the idea are abortive. This insufficiency, as usual, is cured by application of the panacea universally prescribed by

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[179] *Id.* at 909-10.

[180] *Id.* at 917-18.

[181] Glidden Co. v. Zdanok, 370 U.S. 530 (1961); U.S. v. Allocco, 305 F.2d 704 (2d Cir. 1962). *See also The De Facto Officer Doctrine, supra* note 163, at 918.

[182] Glidden Co. v. Zdanok, 370 U.S. 530 (1961); U.S. v. Allocco, 305 F.2d 704 (2d Cir. 1962).

[183] Cases cited note 182 *supra.*

[184] U.S. v. Allocco, 305 F.2d 704 (2d Cir. 1962).

[185] State v. Carroll, 38 Conn. 449, 9 Am. R. 409 (1871); State v. Poulin, 105 Me. 224, 74 A. 119 (1909); Lawrence v. MacDonald, 318 Mass. 520, 62 N.E.2d 850 (Sup. Jud. Ct. 1945).

[186] Lawrence v. MacDonald, 318 Mass. 520, 527, 62 N.E.2d 850, 854 (Sup. Jud. Ct. 1945).

[187] State v. Carroll, 38 Conn. 449, 467, 9 Am.R. 409, 423 (1871).

[188] *See* Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907).

[189] *Id.*

public policy — a *de facto* doctrine.[190] The patient, however, while appearing to be in perfect health, in fact is not, and must be characterized as illegal, although acknowledged as legal.

The problem of illegally-constituted legislatures, as distinct from their component legislators, usually is created by a judicial declaration of invalidity of a State constitutional or statutory plan of legislative apportionment, as violative of the State or Federal Constitutions.[191]

Where the issue is one of unconstitutionality *vis-a-vis* the *State* constitution, and is raised subsequent to the election of a State legislature pursuant to the allegedly illegal apportionment plan, a *de facto* character is ascribed to the legislature.[192] This result proceeds from one of two causes. One alternative is refusal of the judiciary to take jurisdiction to adjudicate unconstitutionality of the apportionment plan.[193] It is based on the premise that a declaration of invalidity of the apportionment scheme would result in destruction of the State legislature.[194] However, by refusing to allow any attack to be made upon the *de jure* status of an entity which it acknowledges as illegal, the court, in effect, recognizes the existence of a *de facto* entity.[195] The other alternative is a determination that, if the legislature has been elected, *and* has assembled, prior to the

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[190] Honsey v. Donovan, 236 F. Supp. 8 (D.C. Minn. 1964); Jonas v. Hearnes, 236 F. Supp. 699 (W.D. Mo. 1964); League of Nebraska Municipalities v. Marsh, 232 F. Supp. 411 (D.C. Neb. 1964); Paulson v. Meier, 232 F. Supp. 183 (S.D.N.D. 1964); Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907). *See also* Sherrill v. O'Brien, 186 N.Y. 1, 79 N.E. 7 (1906); People *ex rel.* Baird v. Bd. of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893); Burns v. Flynn, 155 Misc. 742, 281 N.Y.S. 494 (Sup. Ct. 1935), *aff'd*, 246 App. Div. 799, 281 N.Y.S. 497 (1935), *aff'd*, 268 N.Y. 601, 198 N.E. 424 (1935). Note that the doctrine of estoppel is as inapplicable to legislatures as to public officers.

[191] *See, e.g.*, WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965); Travia v. Lomenzo, 382 U.S. 9 (1965), and Screvane v. Lomenzo, 382 U.S. 11 (1965), *aff'g per curiam*, orders of Fed. Dist. Ct., S.D.N.Y., dated May 24, 1965, and July 13, 1965; Schaefer v. Thomson, 251 F. Supp. 450 (D. Wyo. 1965), *aff'd, per curiam, sub nom* Harrison v. Schaefer, 383 U.S. 269 (1966); Herweg v. Thirty-Ninth Legislative Assembly, 246 F. Supp. 454 (D. Mont. 1965); Paulson v. Meier, 246 F. Supp. 36 (S.D.N.D. 1965); Petuskey v. Rampton, 243 F. Supp. 365 (D. Utah 1965); Honsey v. Donovan, 236 F. Supp. 8 (D.C. Minn. 1964); Jonas v. Hearnes, 236 F. Supp. 699 (W.D. Mo. 1964); League of Nebraska Municipalities v. Marsh, 232 F. Supp. 411 (D.C. Neb. 1964); Paulson v. Meier, 232 F. Supp. 183 (S.D.N.D. 1964); Reynolds v. State Election Bd., 233 F. Supp. 323 (W.D. Okla. 1964); Baker v. Carr, 222 F. Supp. 684 (D. Tenn. 1963); Moss v. Burkhart, 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd, per curiam, sub nom.* Williams v. Moss, 378 U.S. 558 (1964); Sims v. Frink, 208 F. Supp. 431 (N.D. Ala. 1962), *aff'd sub nom.* Reynolds v. Sims, 377 U.S. 533 (1964); Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Sherrill v. O'Brien, 186 N.Y. 1, 79 N.E. 7 (1906). *See also* Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (Sup. Ct. 1956).

[192] *See, e.g.*, Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Sherrill v. O'Brien, 186 N.Y. 1, 79 N.E. 7 (1906); Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (Sup. Ct. 1956).

[193] Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (Sup. Ct. 1956).

[194] *Id.*

[195] A *de facto* entity is one which is illegal, but is treated as legal. BLACK'S LAW DICTIONARY 513 (3d ed. 1933).

declaration of invalidity of the apportionment plan, it is a legislature *de facto*.[196] Under this approach, the legislators also are *de facto*.[197] Theoretically, therefore, they could be ousted from office in a direct proceeding to try their titles thereto — and *only* in such direct proceeding.[198] Since, however, each house of the legislature is the exclusive judge of the election and qualifications of its members, the courts have no jurisdiction to entertain this proceeding once the legislature has assembled.[199] Consequently, a State legislature, elected and in office pursuant to an apportionment scheme *thereafter* held to violate the *State* constitution, not only is a *de facto* entity, but is one whose *de jure* status is impregnable to attack, *whether collateral or direct*.[200]

The status of a legislature, elected pursuant to an apportionment plan held violative of the *State* constitution *prior* to the election, has not been determined by State courts.[201]

Where the issue is one of unconstitutionality *vis-a-vis* the *Federal* Constitution, three situations possibly may arise. The first involves a decision by the federal courts that a State legislature, presently existing as such, was elected pursuant to an apportionment plan violative of the Federal Constitution. Under federal law, this legislature is considered to be a *de facto* entity.[202] Its existence is, however, subject to termination at the pleasure of the federal courts.[203] The second involves the granting of permission, by the federal courts, for the holding of a State legislative election pur-

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[196] Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907). *See also* People *Ex rel.* Baird v. Bd. of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893); Burns v. Flynn, 155 Misc. 742, 281 N.Y.S. 494 (Sup. Ct. 1935). In Sherrill v. O'Brien, 188 N.Y. at 212, the New York Court of Appeals stated: "[W]hether the Apportionment Act of 1906 was constitutional or not, the legislature which might be actually chosen by the electors of the state under that apportionment would be a *de facto* legislature, whose acts would, in all respects be binding."

[197] Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Sherrill v. O'Brien, 186 N.Y. 1, 79 N.E. 7 (1906).

[198] Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907).

[199] *Id.*; Sherwood v. State Board of Canvassers, 129 N.Y. 360, 29 N.E. 345 (1891).

[200] Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (Sup. Ct. 1956).

[201] In New York, the courts recently have taken jurisdiction to declare a legislative apportionment scheme void as violative of the state constitution. *In re* Orans, 45 Misc. 2d 616, 257 N.Y.S. 2d 839 (Sup. Ct. 1965), *aff'd* 15 N.Y. 2d 339, 206 N.E.2d 854 (1965). The judgment of invalidity was rendered *prior* to the holding of any election pursuant to the void plan. An injunction against the holding of any such election was granted. Glinski v. Lomenzo, 16 N.Y.2d 27, 209 N.E.2d 277 (1965). The federal courts thereupon intervened to compel the holding of an election pursuant to the void plan. WMCA, Inc. v. Lomenzo, 246 F. Supp. 953 (S.D.N.Y. 1965) *aff'd, per curiam,* Travia v. Lomenzo, 382 U.S. 287 (1965). Since no proceedings were brought to set aside the election after it had been held pursuant to federal court order, it is unknown what status the *New York* courts would have attributed to the *legislature* elected thereunder, if left to their own devices. As a matter of federal law, however, this *legislature* is *de facto*. *See* notes 202, 204, 206 *infra*.

[202] Honsey v. Donovan, 236 F. Supp. 8 (D. Minn. 1964).

[203] *Id.*

suant to an apportionment scheme which they previously have held to contravene the Federal Constitution. Legislatures so elected also are characterized as *de facto*.[204] Theoretically, their existence also is terminable at the will of the federal courts.[205] Finally, the federal courts have *created de facto* legislatures. To wit, they have directed the holding of State legislative elections pursuant to apportionment plans promulgated by the federal courts.[206] These legislatures are *de facto* because (1) they are illegally constituted, insofar as State law is concerned;[207] and (2) they are treated as legal, their legality being maintained by the federal courts.[208]

Although all of the *de facto* legislatures described above are characterized as illegal,[209] none of them are vulnerable to collateral attack,[210] and only two of them are subject to direct attack.[211] The exceptions, moreover, are liable to extinction only by the federal courts, at their pleasure.[212]

5. Divorce

Jurisdiction to create the status of divorce is possessed, in theory, only by the courts of a jurisdiction in which at least one of the parties to the marriage is domiciled.[213] Yet, the intrinsic characteristics of divorce frequently are attributed to situations in which it is found that the condition of domicile was not fulfilled.[214] These situations are treated as legal, but denominated illegal.[215] This variety of legal illegality rests upon the doctrines of res judicata and estoppel, not *de factoism*.[216]

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[204] Jonas v. Hearnes, 236 F. Supp. 699 (W.D. Mo. 1964); League of Nebraska Municipalities v. Marsh, 232 F. Supp. 411 (D. Neb. 1964); Paulson v. Meier, 231 F. Supp. 183 (S.D.N.D. 1964).

[205] Cases cited note 204 *supra*.

[206] *See, e.g.*, Screvane v. Lomenzo, 382 U.S. 11 (1965); Travia v. Lomenzo, 382 U.S. 9 (1965); WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965); Herweg v. The Thirty-Ninth Legislative Assembly, 246 F. Supp. 454 (D. Mont. 1965); Paulson v. Meier, 246 F. Supp. 36 (S.D.N.D. 1965); Petuskey v. Rampton, 243 F. Supp. 365 (D. Utah 1965); Schaefer v. Thomson, 251 F. Supp. 450 (D. Wyo. 1965); Reynolds v. State Election Board, 233 F. Supp. 323 (W.D. Okla. 1964); Baker v. Carr, 222 F. Supp. 684 (D. Tenn. 1963); Moss v. Burkhart, 220 F. Supp. 149 (W.D. Okla. 1963); Sims v. Frink, 208 F. Supp. 431 (N.D. Ala. 1962), *aff'd sub nom.* Reynolds v. Sims, 377 U.S. 533 (1964).

[207] State law generally requires that legislative apportionment schemes be created by act of the state legislature, or a commission set up for this purpose. It does not authorize their creation by the federal judiciary.

[208] Cases cited at note 206 *supra*.

[209] Cases cited at note 191 *supra*.

[210] Cases cited at note 191 *supra*.

[211] Cases cited notes 202, 204 *supra*.

[212] Cases cited notes 202, 204 *supra*.

[213] G. STUMBERG, *supra* note 79, at 296.

[214] H. GOODRICH & E. SCOLES, CONFLICT OF LAWS § 127 (4th ed. 1964).

[215] *Id.*

[216] *Id.*

Res judicata operates to preclude all collateral attacks, by whomsoever made, upon a divorce decree obtained in a proceeding in which both parties to the marriage appeared.[217] This result obtains irrespective of whether the fact of domicile was litigated in the divorce proceeding.[218]

Ex parte divorces are not entitled to the benefits of res judicata.[219] Their effectiveness depends upon the selective operation of the doctrine of estoppel.[220] Estoppel bars both the party procuring the divorce, and a spouse who remarries in apparent reliance upon it, from collaterally contesting its validity.[221] Third parties, however, such as the State and children of the first marriage, may assert the invalidity of the divorce in a collateral proceeding.[222]

Where estoppel is the cause of a situation being characterized as a divorce, it has been observed that the divorce still must be considered as invalid.[223] And, where the status of divorce is produced by application of res judicata, discussion is couched in terms of vulnerability to attack, not validity.[224]

B. *Legal Illegality — Genesis and Regenesis*

Examination of the judicial approach to corporations, corporate officers and directors, public officers, legislatures, and divorce, manifests a pattern of consistent inconsistency. In the case of each of these categories, the inherent attributes of the juristic entity, or legal status — its consequences of legality — are imputed to a variety of factual situations. Yet only one of these situations is characterized as legal — *de jure.* Uniformly, it is the one whose name is borne by the legal concept of which it is a constituent class. The remainder, denominated variously as "quasi,"[225] "near,"[226] *de facto,*[227] "by estoppel,"[228] or the result of res judicata,[229] commonly are characterized as illegal.

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[217] *Id.* at 258-59. Thus, the decree is impregnable to attack, not only by the parties thereto, but by their children, subsequent spouses, and the state.

[218] *Id.* at 258-59.

[219] *Id.*, § 127.

[220] *Id.* at 259-60.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.* at 258.

[225] *Legal persons. See* pt. III A 1a *supra.*

[226] *Id.*

[227] *Corporateness,* corporate officers and directors, public officers, and legislatures. *See* pts. III A 1b-4 *supra.*

[228] *Corporateness,* corporate officers and directors, and divorce. See pts. III A 1b, 2, and 5 *supra.*

[229] Divorce. *See* pt. III A 5 *supra.*

Classification of facts as legal, simultaneously legal and illegal, or as illegal, constitutes a paradox. It originates from two sequential misconceptions: one semantic, the other analytic.

On the semantic side of the coin, the fallacious belief that legality and illegality can have objective existence, has perpetuated the procrustean identification of legal concepts with the component classes whose names they bear. Thus, artificial personality and corporateness are equated with corporation; corporate and public officeholding with corporate officers and directors, and public officers; legislativeness with legislatures; and termination of marital status with divorce. This false identification of the genus with one of its species has necessitated the assumption that the inherent qualities of a concept can be attributed to a factual situation which does not correspond to the concept as a schematism. This fallacy, in turn, results in postulation of the coincident existence of the antipodal concepts "legality" and "illegality."

Since, however, the attributes of a legal concept are correlative to the conditions of its realization, it is impossible to recognize a concurrence of "legality" and "illegality." For, all circumstances to which are attributed the inherent qualities of a legal concept *a priori* comply with the conditions for its realization, and are "legal." Hence, those factual situations, described as "quasi" or "near," or as possessing the consequences of legality *de facto,* by estoppel, or as the result of res judicata, must be characterized as "legal."

Acceptance of this radical inversion of a keystone of juristic thought, requires extirpation of the jural chimeras known as "legal fictions" — recognition that distinctions between reality and fiction are irrelevant, insofar as the Law is concerned. For, the fallacious assumption, that factual situations possessed of the consequences of legality can be described as illegal, has been perpetuated by universal acceptance of the erroneous theory that there *are* such creatures as legal fictions. To wit, that which the law recognizes as real can be characterized as fiction. For example, apart from the imputation of illegality implicit in the terms quasi, near, *de facto,* estoppel, res judicata, voidable, constructive, and implied, it has been stated that the *de facto* doctrine does not recognize the existence, as legal entities, of *de facto* corporations,[230] *de facto* corporate officers and directors,[231] or *de facto* public officers.[232] Non-

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[230] R. STEVENS, *supra* note 82, § 29. *See also* Eaton v. Aspinwall, 19 N.Y. 119 (1859).

[231] R. STEVENS, *supra* note 82, § 160.

[232] State v. Carroll, 38 Conn. 449, 9 Am. R. 409 (1871); City of Lawrence v. MacDonald, 318 Mass. 520, 62 N.E.2d 850 (Sup. Ct. 1945); State v. Poulin, 105 Me. 224, 74 A. 119 (1909).

corporate legal persons,[233] *de facto* corporate officers and directors,[234] and *de facto* public officers,[235] have been described, moreover, as legal fictions. The doctrine of estoppel, likewise, is said not to involve recognition of the legal existence of the status, created thereby, of corporations,[236] or of divorce.[237]

The only effective method of eradicating legal fictions from juristic thought is "nominicide."[238] That is to say, all words and phrases connotative of "legal illegality" must be expunged from legal terminology. Included in this "little list of society offenders who . . . never would be missed"[239] are "quasi," "near," "*de facto*," "legal by estoppel," "legal by reason of res judicata," "voidable," "constructive," and "implied." And, like Abou Ben Adhem's name,[240] the term "legal fiction" leads all the rest.

The necessity for this measure is manifested by examination of the scanty expressions of belief in the actual existence of so-called *de facto* corporations.[241] These expressions are self-defeating, in that they describe an entity as being, at one and the same time, both *de facto* and real. Likewise, some statutes which provide legislative authorization for the impregnability to attack of the legal existence of so-called *de facto* corporations, in all proceedings except direct attacks by the State, refer to these corporations as *de facto*.[242]

The resultant terminological deficiency can be alleviated by use of the phrase "juridical construction" as the appropriate denomination for all facts, or aggregates of facts, recognized in Law.[243] A fact, or aggregate of facts, to which is attributed the consequences of legality properly would be described as a juridical construction of the relevant concept. For example, all factual situations to which are imputed the attributes of corporateness, whether presently denominated *de jure, de facto,* or by estoppel, would be called juridical constructions of corporateness.

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[233] *In re* Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941).

[234] *In re* Ringler & Co., 204 N.Y. 30, 97 N.E. 593 (1912).

[235] City of Lawrence v. MacDonald, 318 Mass. 520, 62 N.E.2d 850 (Sup. Ct. 1945).

[236] H. BALLANTINE, *supra* note 82, § 127.

[237] H. GOODRICH & E. SCOLES, *supra* note 214, § 27.

[238] A semantic fabrication, signifying the destruction of names.

[239] GILBERT & SULLIVAN, *The Mikado,* in THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 345, 352 (1938).

[240] L. HUNT, *Abou Ben Adhem, in* THE BOOK OF CLASSIC ENGLISH POETRY 600-1830, at 1510 (E. Markham ed. 1926).

[241] *See* notes 132-33 *supra.*

[242] S.D. CODE § 11.0108 (1939). *See also* MINN. STAT. ANN. tit. 20, § 301.08 (1947); OKLA. STAT. ANN. tit. 18, § 1.14(c) (1941) (refers to psuedo-corporation). The Commissioner's Note to § 9 of the Model Business Corporation Act quotes, moreover, from Society Perun v. Cleveland, 43 Ohio St. 481, 490, 3 N.E. 357 (1885), referring to *de facto* corporations as real. MODEL BUS. CORP. ACT 71, § 9 (1953) (withdrawn 1957).

[243] *See* pt. I *supra.*

Consequently, the path to comprehension of the true character of the analysis to be made is clear. The classification of facts as simultaneously legal and illegal, involves a purely qualitative analysis of facts according to their juristic nature. This analysis ignores the gradational aspect of attributions of consequences of legality. Proper analysis is bivalent in nature. Qualitatively, it categorizes factual situations as legal or illegal. In other words, it determines *whether* the consequences of legality are attributable to a particular factual situation. Quantitatively, it *measures the extent* to which the consequences of legality are attributable to the "juridical constructions" of a concept. Since attribution of the consequences of legality recognizes both the existence and the degree of the quality of legality — *i.e.,* is constitutive of them — legal illegality is regenerated as a doctrine of relative recognition.

IV. RELATIVE RECOGNITION — OLD WINE IN A NEW BOTTLE

Acceptance of a doctrine of relative recognition operates to substitute one system of legal terminology for another. The present system considers legality as independent of the attribution of its consequences to factual situations. In other words, definitions and descriptions of rights, duties, personality, status, and other expressions of legality, do not correspond to the entirety of circumstances which require or permit attribution of the consequences of legality. Legality, however, *is* dependent upon, and correlative to, the totality of these circumstances. This system, therefore, is both inadequate and misleading. John Chipman Gray, for example, has observed, apparently in all seriousness:

> What we want for the conduct of life is to know what are the acts and forbearances which the State protects, and what are the acts and forbearances which it compels; in other words, what are legal rights and duties? *At whose instance these acts and forbearances are protected and enforced, though important, is yet of secondary importance.*[244] [Italics supplied.]

The function of the proposed system of legal terminology is to make manifest the correlation between legality and the circumstances which require or permit attribution of its consequences.

A. *Relative Recognition — Formulation*

Simply to state that all factual situations which require or permit attribution of the consequences of legality must be characterized as legal, because such attribution recognizes, or is constitutive of, the quality of legality, is inadequate as an analysis of legality. For, "legality" is a compound expression. It encompasses both the

[244] J. GRAY, *supra* note 1, at 83.

inherent qualities of the idea whose meaning is represented by a legal concept, and the attribution of these qualities to a factual situation. Although these qualities are absolute,[245] attribution of these qualities is relative. The variable which constitutes this relativity, consists in the class of persons who are capable of forbidding this attribution.[246] Adequate analysis must take account of both aspects of "legality." It must be formulated as a doctrine of relative recognition, in terms of the variable constitutive of the relativity. That is to say, all circumstances which require or permit the attribution of the consequences of legality not only must be characterized as "legal," but also must be classified with reference to the class of persons who are capable of barring recognition of legality.

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[245] Attribution of the *consequences of legality* of a legal concept necessarily involves attribution of *all* of the inherent qualities of the *idea* whose meaning is represented by the concept. WEBSTER'S NEW INT'L DICTIONARY 552 (Concept) (2d. ed. unabr. 1937).

[246] Although the relative aspect of *legality* heretofore has been recognized in connection with *artificial personality,* its true nature has been obscured by the misconception that the variable, constitutive of this relativity, consists in the quantum of the qualities of *corporateness* which are attributable to a factual situation. Friedmann, for example, accurately states: "It would, perhaps, be truer to say that legal personality is not absolute, that it can exist to a smaller or greater degree . . . ." Yet, he goes on to observe, quoting Gower: "The relativity of corporate personality, both in quantity and quality, thus is demonstrated by the modern treatment of incorporated associations as well as the status of unincorporated associations. 'Between the two extremes of an unincorporated club or society and the corporation there are many hybrids which, though formally unincorporated, possess a greater or lesser number of the attributes of a corporation.' " W. FRIEDMANN, *supra* note 7, at 525-26. Similarly Nékam observes: "[T]here exists a gradation among the legal entities which extends from those which are considered as such for the purpose of a single right only to those which have a great number of rights attributed to them." A. NEKAM, *supra* note 46, at 45. This approach derives from the identification of artificial personality with corporateness. *See* Carle v. Carle Tool & Eng'r Co., 36 N.J. Super. 36, 114 A.2d 738 (1955); National Union of Gen. & Municipal Workers v. Gillian, [1946] K.B. 81 (C.A. 1945). It involves a confusion between differences in kind and differences in degree. Artificial personality, however, is not identical with corporateness. Inherent in it is but one quality, *i.e.,* entitativeness — any institution which possesses one or more inherently entitative powers, rights, or capacities, is an artificial person. A. KOCOUREK, *supra* note 105, at 277-85; A. NEKAM, *supra;* J. SALMOND, *supra* note 7, §§ 108, 113; Smith, *supra* note 105, at 283. The fact that an *artificial person* does not possess all of the inherently corporate powers, rights, and capacities does not constitute it a *lesser* type of artificial person, but simply a *different* type of artificial person. That is to say, although legal entities are classified according to the number of inherently entitative powers, rights, and capacities which they possess, the differences between the resultant classes are in kind, not in degree. Corporations, for example, are considered to be *de jure* legal persons although they lack the capacity to marry possessed by the competent natural person. Infants and incompetents, moreover, are considered to be *de jure* legal persons although they lack many powers, rights and capacities possessed by competent adult natural persons. Consequently, the variable constitutive of the relativity of artificial personality cannot be said to consist in the *quantum* of inherently corporate powers, rights and capacities attributable to a factual situation. Rather, as in the case of other legal concepts, it consists in the class of persons capable of forbidding the attribution, to a particular factual situation, of the quality of entitativeness.

It follows that proper analysis of artificial personality is dual: First, according to differences in *kind,* arising from the *number* of inherently entitative powers, rights, and capacities possessed. These differences are absolute. This classification demarcates the species of the generic legal concept artificial personality, one of which is corporateness. Each of these species is itself a legal concept, possessed of inherent qualities peculiar to it. Second, according to differences in *degree,* arising from the class of persons capable, with respect to each *kind* of artificial personality, of barring the attribution of entitativeness. These differences are relative.

The proposed doctrine of relative recognition, therefore, should be formulated as a hierarchy of juridical constructions of legal concepts.[247] For example, the doctrine first would be stated in general terms: (1) attribution to a factual situation of the consequences of legality constitutes recognition that the factual situation possesses the quality of legality — *all* the qualities inherent in the idea represented by the concept being applied; (2) all factual situations which thus are recognized to possess the quality of legality, are denominated juridical constructions of the legal concept whose consequences of legality are attributed to them; (3) juridical constructions of a legal concept must be classified with reference to the extent to which the consequences of legality are attributable to them — in terms of the class of persons who are capable of barring their recognition.

Classification of the juridical constructions of legal concepts produces a four-tiered arrangement. The highest category is that of absolute impregnability. To wit, recognition of the quality of legality can be precluded by no one. The most prominent members of this grouping are the tautonyms of legal concepts, presently described as *de jure.* Examples of these include, *inter alia, de jure* corporations; *de jure* corporate officers and directors; *de jure* public officers; *de jure* legislatures; valid divorce and those varieties of so-called *de facto* legislatures whose existence *de jure* can be controverted by no one.[248] Similarly included are those so-called *de facto* legal persons, which are treated as entities, to the extent of the inherently corporate powers, rights, and capacities, which they rightfully possess, not only as to third persons, but also insofar as their constituent human beings are concerned.[249] Additional components of this class are those factual situations to which certain varieties of res judicata are applicable,[250] as well as those which are conclusively presumed to exist.[251] All members of this category are denominated juridical constructions of the first degree.

The second category is one of particular vulnerability. It comprises the circumstances which permit denial of the attribution of the consequences of legality of a legal concept to its *de jure* tautonyms. The most obvious illustrations of this variation are the circumstances which require or permit lifting the veil of corporate person-

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[247] *See* pt. III B *supra.*

[248] *See* pt. III A 4 *supra.*

[249] *See, e.g.,* Carle v. Carle Tool & Eng'r Co., 36 N.J. Super. 36, 114 A.2d 738 (1955) (statutory limited partnership); Walker v. Wait, 50 Vt. 668 (1878) (ordinary partnership); Bonsor v. Musicians' Union, [1956 H.L.] A.C. 104 (trade unions).

[250] *See, e.g.,* pt. III A 5 *supra.*

[251] *E.g.,* constructive possession, constructive delivery, constructive notice.

ality.[252] A further example is the so-called *de facto* merger doctrine.[253] Its function is to invalidate otherwise valid sales of corporate assets, on the ground that they are really mergers which have failed to comply with statutory requirements therefor.[254] Also included in this category are those factual situations presently characterized as voidable. Members of this category may be described as juridical constructions of the second degree.

The third category is one of modified impregnability. That is to say, recognition of enjoyment of the quality of legality, by factual situations which do not fulfill, strictly, the conditions for *de jure* legality, can be precluded only by an exceedingly restricted class of persons, and only under limited conditions. The most conspicuous members of this class are the so-called *de facto* situations. Some examples of these are *de facto* corporations; *de facto* corporate officers and directors; and *de facto* public officers. Also included in this grouping are those *de facto* legislatures whose existence is subject to termination at the pleasure of the federal courts.[255] Additional components of this class are those so-called *de facto* legal persons which are treated as entities, to the extent of the inherently corporate powers, rights and capacities, which they rightfully possess, but only insofar as third persons are concerned.[256] Their entitativeness can be precluded by their constituent human beings, although only with respect to dealings between the entity and its components.[257] Possible further candidates for inclusion in this class are circumstances in which res judicata is deemed inapplicable, although, conceivably, it might have been applicable. For example, where the person sought to be bound by the doctrine was not a party to the prior action, although he should have been. The phrase, juridical constructions of the third degree, denotes members of this category.

The lowest tier of this hierarchy is that of particular impregnability. To wit, recognition of enjoyment of the quality of legality, by factual situations which do not fulfill, strictly, the conditions for *de jure* legality, can be precluded by *all but* an exceedingly limited class of persons, under *all but* exceedingly limited conditions. Encompassed in this category are all factual situations to which the doctrine of estoppel is applicable. Representative of the members

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[252] *See* W. FRIEDMANN, *supra* note 7, at 473, 515-28.

[253] Folk, *De Facto Mergers in Delaware: Hariton v. Arco Electronics, Inc.*, 49 VA. L. REV. 1261 (1963).

[254] *Id.*

[255] *See* pt. III A 4 *supra.*

[256] *See, e.g.*, Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947) (ordinary partnership); Bonsor v. Musicians' Union, [1954] 2 W.L.R. 687 (C.A.) (trade unions). The same is true of trusts, when treated as entities insofar as third persons are concerned.

[257] Note 256 *supra.*

of this class are corporations by estoppel; corporate officers and directors by estoppel; and divorce by estoppel. Also included in this class are those factual situations whose existence is implied, *e.g.*, implied contracts, and implied or constructive trusts. Members of this class are denominated juridical constructions of the fourth degree.

Formulation of legal consequences in terms of recognition is not novel. The legal effects of judgments, for example, frequently are expressed in this fashion.[258] Recognition also is an operative principle of international law.[259] Yet, although acceptance of a doctrine of relative recognition would cause no substantial change in juristic thinking with respect to recognition of judgments, it possibly might avail to sever the Gordian Knot of "recognition" in international law.

B. *Recognition as an Instrument of Juristic Analysis in International Law*

"State" and "government," like "corporation," "corporate officer or director," "public officer," "legislature," and "divorce," are tautotypical legal concepts. It follows, therefore, that all factual situations, which require or permit attribution of the consequences of legality of these concepts, must be characterized as legal — as juridical constructions of "States" or "governments." For, attribution of these consequences recognizes, or is constitutive of, the quality of legality. Yet, in international law, as in municipal law, legal illegality endures. In this sphere, it occurs as a function of international recognition. Its existence causes application of the doctrine of relative recognition to be as logically unavoidable in the sphere of international law, as it is in the sphere of municipal law. This doctrine, however, is insufficient, in and of itself, to resolve the problem of legal illegality in international law. For, in this area, legal illegality has enabled the treatment, as legal, of entities which, as a matter of public policy, are incapable of being characterized as legal. This treatment has been justified by the ancient error: that attribution of the consequences of legality is not constitutive of the quality of legality. Thus, prerequisite to the necessary application, in international law, of the doctrine of relative recognition, is a redetermination of the circumstances to which the consequences of legality of statehood and government can be attributed.

1. Legal Illegality in International Law

Classification of States and governments, as commonly expressed, is identical with that of public officers: *de jure; de facto;*

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[258] *See, e.g.*, G. STUMBERG, *supra* note 79, at 111-33.

[259] *See* pt. IV B *infra*.

and usurping — those whose continued existence is in doubt.[260] Yet, whereas these terms, in municipal law, are rigid in their meanings,[261] they have, in international law, such variegated meanings as to be useless as analytic tools.[262]

Thus, Austin, although asserting that "every government properly so called is a government *de facto*,"[263] distinguishes between three kinds of governments:

> First, governments which are governments *de jure* and also *de facto;* secondly, governments which are governments *de jure* but not *de facto;* thirdly, governments which are governments *de facto* but not *de jure*.[264]

According to Borchard, however, as a matter of practice, the term *de jure* is applied to states and governments "one likes and recognizes,"[265] often irrespective of whether they presently are established and effective; the term *de facto* being applied to states and governments "one dislikes and declines to recognize,"[266] also irrespective of whether they presently are established and effective.

Borchard would prefer to apply the term *de facto* to usurpers:

> The suggestion that recognized governments are governments *de jure,* and unrecognized governments only de facto . . . is . . . unlegal . . . . The term *de facto* has a more appropriate application with reference to revolutionists in the field, who administer public affairs in some limited area, before they establish themselves as a government or found a state.[267]

The term *de facto,* moreover, is applied not only to established states and governments, when unrecognized, and to those whose

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[260] 1 J. AUSTIN, *supra* note 8, at 336; 2 J. BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 503-555 (1901); J. HERVEY, THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW 12-16 (1928); Borchard, *The Unrecognized Government in American Courts,* 26 AM. J. INT'L L. 261 (1932) For classification of *public officers,* see pt. III A 3 *supra.*

[261] When used with reference to corporations, corporate officers and directors, or public officers, etc.

[262] In fact, they could be said to qualify for additional compensation under Humpty-Dumpty's principle: "When I make a word do a lot of work like that . . . I always pay it extra." LEWIS CARROLL, THROUGH THE LOOKING-GLASS, ALICE IN WONDERLAND 247 (Modern Library ed.). *See, e.g.,* 1 J. AUSTIN, *supra* note 8; J. HERVEY, *supra note* 260; H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 275-77 (1956); Borchard, *supra* note 260; Lauterpacht, *Recognition of Governments: I,* 45 COLUM. L. REV. 815 (1945).

[263] 1 J. AUSTIN, *supra* note 260.

[264] *Id.* Austin describes these classes as follows: "A government *de jure* and also *de facto* is a government deemed lawful . . . which is present or established. . . . A government *de jure* but not *de facto,* is a government deemed lawful . . . which, nevertheless, has been supplanted or displaced. . . . A government *de facto* but not *de jure,* is a government deemed unlawful . . . which, nevertheless, is present or established. . . . A government supplanted or displaced, and not deemed lawful, is neither a government *de facto* nor a government *de jure.* Any government deemed lawful, be it established or be it not, is a government *de jure* . . . . In strictness, a so called government *de jure* but not *de facto,* is not a government. It merely is that which was a government once, and which (according to the speaker) ought to be a government still."

[265] Borchard, *supra* note 260, at 262.

[266] *Id.*

[267] *Id.* at 263.

continued existence is in doubt, as in the case of revolution or civil war, but to those which are recognized conditionally.[268] Furthermore, classification of States and governments as *de jure, de facto,* or usurping, does not determine, *per se,* whether, or to what extent, the consequences of legality shall be attributed to them.[269] For, in international law, the *sine qua non* of juristic personality is recognition, as defined by international law.[270]

States and governments, therefore, properly are classified, under international law, either as recognized, or as unrecognized. As in municipal law, however, the consequences of legality of statehood and government are attributed not only to recognized, or *de jure,* entities, but also to unrecognized, or illegal, entities.

In contrast to the situation existing in municipal law, however, application of the doctrine of relative recognition, to all non-recognition situations now treated as legal, does not eliminate legal illegality. For, the treatment, as legal, of non-recognition situations, can create a state of affairs in which the judiciary has recognized, or constituted, the existence of a State or government whose non-existence is required by executive policy. Where this state of affairs exists, public policy, in the form of national self-interest, prohibits the characterization as legal of the non-recognition situations judicially treated as legal. Hence, a reclassification of the factual situations to which the consequences of legality of statehood or government *can be attributed,* is prerequisite to the inescapable application of the doctrine of relative recognition in the sphere of international law. This redetermination involves isolation of those non-recognition situations to which public policy denies the characterization of legality.

Once these situations are eliminated from the group of non-recognition situations which are treated as legal, the doctrine of relative recognition can be applied in conformity with the exigencies of public policy.

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[268] *Institut DeDroit International: Resolutions Concerning the Recognition of New States and New Governments,* 30 AM. J. INT'L L. SUPP. 185 (1936).

[269] *See, e.g.,* The Arantzazu Mendi, [1939] P. 37 (C.A.), *aff'd,* [1939] A.C. 256, 33 AM. J. INT'L L. 583 (1939); Banco de Bilbao v. Sancha, [1938] 2 K.B. 176 (C.A.); Bank of Ethiopia v. National Bank of Egypt and Liguori, [1937] 1 Ch. 513; J. HERVEY, *supra* note 260, at 3-19; H. KELSEN, *supra* note 262, at 267-92; Borchard, *supra* note 260.

[270] J. HERVEY, *supra* note 260, at 7; H. KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* note 44, at 221-29; H. KELSEN, *supra* note 262, at 267-88; D. O'CONNELL, 1 INT'L LAW 94, 139-40 (1965); Borchard, *supra* note 260; Lauterpacht, *Recognition of Governments: I,* 45 COLUM. L. REV. 815 (1945); Lauterpacht, *Recognition of States in International Law,* 53 YALE L.J. 385 (1944). *See also* pt. IV B 3 *infra.* Although exponents of the declaratory theory of recognition (pt. IV B 2, *infra*) assert that the *sine qua non* of legal personality is compliance with the requirements, other than *recognition,* laid down by international law for the existence of *States* and *governments,* this assertion is contradicted by judicial practice (pts. IV B 3, 4, *infra*).

2. International Recognition — *Sine qua non* of International Juristic Personality

International recognition, of a State or government, is a declaration by one State that, according to international law, another State fulfills the conditions of statehood, or that its government is capable of binding the State which it claims to represent.[271] It is a condition precedent to the proper attribution of the consequences of legality of statehood or government.[272] That is to say, recognition is the determination of a fact which must be made by the competent authority, in the first phase of the legal process, of which the attribution of consequences of legality is the last phase.[273]

Attribution of the consequences of legality of statehood or government to non-recognized entities, however, is not, *per se,* inconsistent with the principle that international recognition is an indispensable prerequisite to the legal existence of States and governments. For, in international law, as elsewhere, there are degrees of legality, *i.e.,* degrees of international recognition. The majority of the non-recognition situations, for example, involve situations which may be termed "representative recognition." That is to say, the non-recognized entity was deemed, in law, to be acting as the representative of a recognized entity. Where, however, no similar substitute for international recognition can be adduced, public policy

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[271] H. KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* note 44, at 221-24; H. KELSEN, *supra* note 262, at 267-75, 280-90; Kelsen, *Recognition in International Law: Theoretical Observations,* 35 AM. J. INT'L L. 605 (1941); Kunz, *Critical Remarks on Lauterpacht's 'Recognition in International Law',* 44 AM. J. INT'L L. 713 (1950); Lauterpacht, *Recognition of Governments:* I, 45 COLUM. L. REV. 815 (1945); Lauterpacht, *Recognition of States in International Law,* 53 YALE L.J. 385 (1944); Meeker, *Recognition and the Restatement,* 41 N.Y.U.L. REV. 83 (1966). Although international *recognition* can be granted either *de jure* or *de facto,* the legal effects, if not the political ones, of both forms of *recognition* are identical. Arantzazu Mendi, [1939] A.C. 256, 265, *aff'g* [1939] P. 37 (C.A.); Luther v. James Sagor & Co., [1921] 3 K.B. 532 (C.A.); Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489 (1887); J. HERVEY, *supra* note 260, at 12-16; H. KELSEN, *supra* note 262, at 275-77; Briggs, *De Facto and De Jure Recognition: The Arantzazu Mendi,* 33 AM. J. INT'L L. 689 (1939); Kallis, *The Legal Effects of Nonrecognition of Russia,* 20 VA. L. REV. 1, 2-3 (1933); Kelsen, *Recognition in International Law: Theoretical Observations, supra.* The only exception to this rule occurs when a dispute arises between two entities, one recognized *de jure* as the government of a state, and the other recognized *de facto* as the government of the same state. Effective and established, the *de facto* entity will prevail where the acts in question were to be effective within its territorial jurisdiction or where the property or claim in question is that of the state *qua* state. Banco de Bilbao v. Sancha, [1938] 2 K.B. 176 (C.A.); Bank of Ethiopia v. National Bank of Egypt & Liguori, [1937] 1 Ch. 513; Haile Selassie v. Cable & Wireless, Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.).

[272] J. HERVEY, *supra* note 260, at 3-19; D. O'CONNELL, *supra* note 270, at 94, 138; Fraenkel, *The Juristic Status of Foreign States, Their Property and Their Acts,* 25 COLUM. L. REV. 544 (1925); Kelsen, *supra* note 271. *See also* Rose v. Himely, 8 U.S. (4 Cranch) 240 (1808); Republic of China v. Merchants' Fire Assur. Corp. of N.Y., 30 F.2d 278 (9th Cir. 1929); The Hornet, 12 F. Cas. 529 (No. 7621) (D.C. N.C. 1870); Taylor v. Barclay, 2 Sim. *213 (1828); The Annette, The Dora, [1919] P. 105.

[273] H. KELSEN, *supra* note 262, at 269-75; Kelsen, *supra* note 271. *See also* cases cited note 292, *infra.*

absolutely forbids the characterization of non-recognition situations as legal. Correlatively, these situations cannot be treated as legal.

Attribution of the consequences of legality of statehood or government, where representative recognition is inapplicable, necessarily involves a rejection, total or partial, of the necessity of international recognition. This rejection has been engendered by four misconceptions: First, as to the conditions requisite for the legal existence of a State or government. Second, as to the authority competent to determine whether these conditions have been met. Third, as to the effects of attribution of the consequences of legality of statehood or government. Fourth, as to the circumstances which compensate for the lack of international recognition.

Clarifying these misconceptions will prevent the treatment, as legal, of those non-recognition situations to which public policy denies the characterization of legal, by re-establishing international recognition as the *sine qua non* of the juristic personality of States and governments.

The prevalent confusion, as to the conditions prerequisite to the legal existence of States and governments, manifests itself as a controversy over the nature and function of international recognition. It has resulted in partially erroneous, and totally antithetical, descriptions of international recognition as constitutive[274] and declaratory.[275]

The constitutive theory considers international recognition of statehood, or government, by the competent authority, to be the sole factor constitutive of the legal existence of the recognized entity, *vis-a-vis* the recognizing entity.[276] At this point, exponents of the constitutive theory come to a parting of the ways. Kelsen denies any right to recognition or any duty to recognize.[277] Lauterpacht, on the other hand, affirms a right in new States and governments to recognition, and a corresponding duty in established States to grant it, if the requirements of international law are fulfilled.[278] The

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[274] H. KELSEN, *supra* note 262, at 269-75; Kelsen, *supra* note 271; Lauterpacht, *Recognition of Governments: I*, 45 COLUM. L. REV. 815 (1945); Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385 (1944). *See also* D. O'CONNELL, *supra* note 270, at 139-40; Borchard, *Recognition and Non-Recognition*, 36 AM. J. INT'L L. 108 (1942); Brown, *The Effects of Recognition*, 36 AM. J. INT'L L. 106 (1942); Meeker, *supra* note 271.

[275] D. O'CONNELL, *supra* note 270, 139-40; Borchard, *supra* note 274; Brown, *The Effects of Recognition*, 36 AM. J. INT'L L. 106 (1942); Kunz, *supra* note 271; Meeker, *supra* note 271.

[276] *See* authorities cited note 274 *supra*.

[277] H. KELSEN, *supra* note 262, at 269-75; Borchard, *supra* note 274; KELSEN, *supra* note 271.

[278] D. O'CONNELL, *supra* note 270, at 139-40; Lauterpacht, *Recognition of Governments: I*, 45 COLUM. L. REV. 815 (1945); Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385 (1944).

constitutive theory affirms that international recognition is a prerequisite to attribution of the consequences of legality of statehood and government.[279] The error of this theory lies, not in itself, but in its effects. It appears to require the erroneous conclusion that these consequences of legality cannot be attributed to *any* acts of unrecognized States or governments.[280]

The declaratory theory asserts that international recognition merely proclaims a *pre*-existing fact; that unrecognized States and governments can have rights and duties in international law.[281] It denies, moreover, the existence of any right to, or duty of, international recognition.[282] Furthermore, it totally rejects international recognition as a condition precedent to attribution of the consequences of legality of statehood or government.[283]

This rejection, however, and its parent theory, arise from the ancient misconception that the Law is founded upon objective realities. Thus, it is asserted that the consequences of legality of statehood and government, *ipso facto*, arise from the objectively real existence of States and governments — in somewhat the same manner as Athena sprang, full-grown, from the forehead of Zeus; a sort of legal parthenogenesis.[284]

Self-existence of States and governments may be conceded in the context of their internal municipal affairs.[285] Their existence, however, insofar as other States and governments are concerned, is a fact which must be determined by competent authority.[286] This fact exists, in law, only if so determined.[287] In practice, moreover, international recognition is considered to be a condition precedent to the attribution of the consequences of legality of statehood and government.[288] The majority of cases which have attributed the consequences of legality of statehood or government to acts of unrecognized States or governments, have done so on theories of representation.[289] In these cases, therefore, the condition precedent, of international recognition, must be deemed to have been met.

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[279] *See* authorities cited note 274 *supra.*

[280] *See* pts. IV B 3, 4 *infra.*

[281] D. O'CONNELL, *supra* note 270, at 139-40; Kunz, *supra* note 271; Meeker, *supra* note 271.

[282] Kunz, *supra* note 271.

[283] *See* authorities cited note 281 *supra.*

[284] D. O'CONNELL, *supra* note 270, at 139-40.

[285] Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827); McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 208 (1808); J. HERVEY, THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW 9-10 (1928); D. O'CONNELL, *supra* note 270, at 94; Fraenkel, *The Juristic Status of Foreign States, Their Property and Their Acts*, 25 COLUM. L. REV. 544 (1925); Kunz, *supra* note 271.

[286] *See* note 273 *supra.*

[287] *See* note 273 *supra.*

[288] *See* notes 272-73 *supra* and note 292 *infra.*

[289] *See* pts. IV B 3 and 4 *infra.*

Equation of the objective existence of States and governments with their legal existence is but one of the errors of the declaratory theory. According to this theory, the judiciary is competent to determine the fact of legal existence of international entities.[290]

Yet, it is clear that international recognition is an indispensable prerequisite to the legal existence of States and governments, *vis-a-vis* other States and governments.[291] That is to say, a State or government exists, insofar as other States and governments are concerned, only in relation to the States or governments which have granted it international recognition. It further is clear, that the only authority competent to grant, or withhold, international recognition of a State or government, is the political department of the recognizing State.[292] Moreover, since the State has a unitary juristic personality, its judiciary is bound by the granting, or withholding, by its political department, of international recognition.[293]

Adherents of the declaratory theory do not dispute the exclusive power of the political department of a State to grant, or withhold, international recognition.[294] They further agree that international recognition absolutely requires attribution, to the recognized entity, of the consequences of legality of statehoood or government.[295] They assert, however, that these consequences of legality can be attributed, by the judiciary, to non-recognized entities whose objective existence has been established by the judiciary.[296]

The only possible legal justification for this assertion, is the

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[290] D. O'CONNELL, *supra* note 270, at 139-40, 181-82; *See* pt. IV B 3, infra. *See, e.g.,* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924); Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961).

[291] *See* notes 272-73 *supra* and pts. IV B 3, 4 *infra.*

[292] *See, e.g.,* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Pearcy v. Stranahan, 205 U.S. 257 (1907); Duff Dev. Co. v. Government of Kelantan, [1924] A.C. 797 (H.L.); Taylor v. Barcley, 2 Sim. *213 (1828); Foster v. Globe Venture Syndicate, Ltd. [1900] 1 Ch. 811; The Annette, The Dora, [1919] P. 105; Dickinson, *The Unrecognized Government or State in English and American Law,* 22 MICH. L. REV. 29, 118 (1923). The above cases expressly disapprove the few cases in which judicial determination of the facts of existence of a *State* or *Government* was made.

[293] *See* note 292 *supra. See also* United States v. Pink, 315 U.S. 203 (1941).

[294] *See, e.g.,* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924); Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923).

[295] *See, e.g.,* United States v. President and Directors of the Manhattan Co., 276 N.Y. 396, 12 N.E.2d 518 (1938); Dougherty v. Equitable Life Assur. Soc'y, 266 N.Y. 71, 193 N.E. 897 (1934); M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933). *See also* United States v. Pink, 315 U.S. 203 (1942); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923).

[296] *See, e.g.,* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923); Upright v. Mercury Bus. Mach. Co., 13 App. Div. 2d 36 (1st Dep't 1961).

fallacious theory that attribution of the consequences of legality of statehood or government is *not* constitutive of the quality of legality.[297] For, public policy bars the judiciary from nullifying the exercise, by the political department of a State, of the latter's exclusive power to determine whether an international entity shall be considered to have legal existence.[298] Yet, the attribution, to an international entity, of the consequences of legality of statehood or government, *is* constitutive of its legal existence.[299]

This error arises from a misconception of the basis of decision of the pre-Russian Revolution non-recognition cases, in which legal effect was given to acts of non-recognized international entities.[300] These cases were not decided on the broad principle that the acts of the non-recognized entities had objective effects which the courts, in justice, could not disregard.[301] Rather, they were decided on the theory that the non-recognized entities, as a matter of law, were acting as representatives of recognized entities.[302]

This theory of representative recognition is the most feasible solution to the impasse created by the attribution, to unrecognized entities, of the consequences of legality of statehood or government. On the one hand, failure of the constitutive theory to realize that there are degrees of legality, has resulted in the theory that a state or governmental act can be treated as such only if performed by a duly authorized agent of a recognized State or government. On the other hand, the objective realities theory fails to realize that attributing to an entity the consequences of legality of statehood or government constitutes that entity a State or government, insofar

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[297] *See, e.g.,* Russian Reins. Co. v. Stoddard, 240 N.Y. 149, 158, 147 N.E. 703, 705 (1925).

[298] United States v. Pink, 315 U.S. 203 (1941); United States v. Belmont, 301 U.S. 324 (1936); *In re* Luks, 45 Misc. 2d 72, 256 N.Y.S.2d 194 (1965); Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.), *rev'g on other grounds,* [1965] 1 Ch. 596 (C.A.). *See also* 4 COLUM. J. TRANSNAT'L L. 328 (1966).

[299] *See* note 274 *supra* and pts. II, III, IV A *supra; In re* Luks, 45 Misc. 2d 72, 256 N.Y.S.2d 194 (Sur. Ct. 1965). O'Connell, moreover, concedes that judicial attribution of the *consequences of legality* of *statehood* or *government* to *unrecognized entities* is, or may be, violative of the public policy vesting exclusive recognitive powers in the political department. D. O'CONNELL, *supra* note 270, 181-82. As a matter of practical politics, it further should be noted that non-recognition frequently stems from a desire to exercise coercion on the non-recognized entity; not from such entity's lack of objective existence. In these cases, it is especially important for the judiciary to implement executive policy. Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941).

[300] *See* pt. IV B 4 *infra.*

[301] *See* pts. IV B 3, 4 *infra. See, e.g.,* for a statement of the broad general principle, M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 18 N.E. 679 (1933); Russian Reins. Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925).

[302] *See* pt. IV B 4 *infra. See, e.g.,* Keith v. Clark, 97 U.S. 454 (1878); Williams v. Bruffy, 96 U.S. 176 (1877); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1868); Pepin v. Lachenmeyer, 45 N.Y. 27 (1871); United States *ex rel.* Hopkins v. United Mexican States, (General Claims Comm'n, U.S. and Mexico, 1926) 21 AM. J. INT'L L. 160 (1927); Silvanie, *Responsibility of States for Acts of Insurgent Governments,* 33 AM. J. INT'L L. 78 (1939).

as the attributing entity is concerned, irrespective of the granting of international recognition. Correlatively, the objective realities theory fails to realize that, insofar as the law is concerned, there are no objective realities; reality is only that which is recognized by the law as such. These failures of the objective realities theory have resulted in recognition, by the judiciary, of the existence of States and governments whose non-existence is recognized, or constituted, by its political department.

Representative recognition, however, avoids the pitfalls of both the constitutive and objective realities theories. It permits the attribution of the consequences of legality of statehood or government to factual situations which do not comply, strictly, with the conditions prerequisite to the existence of statehood or government. Yet, by treating unrecognized entities as if they were the duly constituted agents of recognized entities, it avoids recognition of the former as entities distinct from the latter.

This approach to international recognition parallels the tripartite treatment of public officers — as *de jure, de facto,* and usurpers. And, as is the case with the *de facto* public officer doctrine, representative recognition intrinsically is a doctrine of generalized estoppel.

Moreover, the results, in many cases, would be identical with those flowing from application of the broad principle requiring acknowledgment of objective realities.[303] Furthermore, use of this theory, as a basis for decision, would increase the number of situations in which legal effect properly could be given to acts of unrecognized entities. For example, the ministerial acts of unrecognized governments, to which legal effect has been denied in cases involving the non-recognition of incorporation of the Baltic States into the U.S.S.R.,[304] properly could be given legal effect under this theory.[305]

On the other hand, application of this theory would deny the quality of legality to those non-recognition situations which public

[303] *Cf.* Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961); Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.). Both cases gave legal effect to acts of the unrecognized East German government. Yet, *Upright* did so on the theory that the unrecognized government has "*de facto* existence which is juridically cognizable," whereas *Carl-Zeiss-Stiftung* considered the unrecognized government to be acting as agent for the recognized government of the U.S.S.R.

[304] *See, e.g., In re* Luks, 45 Misc. 2d 72, 256 N.Y.S.2d 194 (Sur. Ct. 1965); *In re* Kapocius' Estate, 36 Misc. 2d 1087, 234 N.Y.S.2d 346 (Sur. Ct. 1962); *In re* Mitzkel's Estate, 36 Misc. 2d 671, 233 N.Y.S. 2d 519 (Sur. Ct. 1962); *In re* Braunstein's Estate, 202 Misc. 244, 114 N.Y.S.2d 280 (Sur. Ct. 1952); *In re* Adler's Estate, 197 Misc. 104, 93 N.Y.S.2d 416 (Sur. Ct. 1949).

[305] *See, e.g.,* Agricultural Cooperative Ass'n of Lithuania Lietukis v. The Denny, 127 F.2d 404 (3d Cir. 1942); Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934).

policy bars from being characterized as legal. It would preclude, for example, such decisions as *Bank of China v. Wells Fargo Bank & Union Trust Co.*[306] In this case, a federal district court, on the theory that objective realities are the paramount consideration, permitted the unrecognized Communist Government of China to intervene in an action, brought by the recognized Nationalist Government of China, to recover funds deposited with the defendant by the Bank of China, a government-controlled entity. The court, moreover, felt constrained to justify its award of the funds to the Nationalist Government by a finding of fact that it has objective existence as a government of China. Yet, it is clear, in such a case as this, application of the objective realities theory is subversive of executive policy.

It would appear, therefore, that acceptance of representative recognition, as the sole permissible alternative to international recognition, is the most equitable method of reconciling the exigencies of individual justice with the imperatives of national political policy; of recognizing degrees of legality of statehood and government, while avoiding the situation in which the existence of an entity is constituted by the judiciary of a State whose executive constituted the entity's non-existence.

3. International Recognition — All or Nothing

Until quite recently, the judiciary has failed to appreciate the applicability of the doctrine of representative recognition.[307] This failure has caused the judicial approach to the legal effects of non-recognition to evolve in two sharply divergent directions.

a. The Ministerial Approach — Equation of Judicial Existence with Political Existence

The unyielding approach of the British judiciary is that, in the absence of international recognition, States and governments must be viewed as legally non-existent; as judicially non-cognizable.[308] This view arises from two undisputed principles. First, the power to grant, or withhold, international recognition belongs exclusively to the political department of a State.[309] Second, the determination

[306] 92 F. Supp. 920 (N.D. Cal. 1950), *remanded for reconsideration,* 190 F.2d 1010 (9th Cir. 1951), *subsequent decision in light of remand,* 104 F. Supp. 59 (N.D. Cal. 1952).

[307] The only recent overt application of *representative recognition* giving legal effect to the acts of a *non-connected,* non-recognized entity, is Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.).

[308] Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1965] 1 Ch. 596 (C.A.), *rev'd on other grounds,* [1966] 3 W.L.R. 125 (H.L.); Luther v. James Sagor & Co., [1921] 1 K.B. 456; Foster v. Glove Venture Syndicate, Ltd., [1900] 1 Ch. 811; Taylor v. Barclay, 1 Sim. *213 (1828); Thompson v. Powles, 2 Sim. *194 (1828); Dolder v. Bank of England, [1805] 10 Ves. Jr. 352; Berne v. Bank of England, [1804] 9 Ves. 347.

[309] *See* cases cited note 292 *supra.*

of the political department, with reference to the existence of other States or governments, as evidenced by its granting, or withholding, of international recognition is conclusive upon the judiciary of the determining State.[310] According to this view, the function of the judiciary, in cases in which the existence of other States, or governments, is a relevant factor, is purely ministerial. International recognition is constitutive of judicial cognizability.[311] Lack of international recognition is constitutive of judicial non-existence.[312] This approach has received sporadic approval from the American courts.[313]

The principal difficulty with this approach is the unfortunate effect of its application to questions of status, over which the individual concerned has little or no control.[314] It is more difficult to sympathize with those individuals who knowingly have purchased property from an unrecognized entity, or from one whose title derived from such entity.[315]

b. The Discretionary Approach — Objective realities can cause the juridical cognizability of international entities to which international recognition has not been accorded.

The American courts are the principal exponents of the doctrine that a "foreign government, although not recognized by the political arm of the . . . Government, may nevertheless have *de facto* existence which is juridically cognizable."[316] This doctrine first was expounded during the era which followed the Russian Revolution and preceded international recognition of the U.S.S.R. by the United States.[317] It has been formulated as follows:

> Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people

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[310] *See* note 293 *supra.*

[311] Luther v. James Sagor & Co., [1921] 3 K.B. 532 (C.A.); Bank of Ethiopia v. National Bank of Egypt and Ligouri, [1937] 1 Ch. 513.

[312] Luther v. James Sagor & Co., [1921] 1 K.B. 456; Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1965] 1 Ch. 596 (C.A.), *rev'd on other grounds,* [1966] 3 W.L.R. 125 (H.L.).

[313] *See, e.g.,* Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852); The Nueva Anna and Liebre, 19 U.S. (6 Wheat.) 193 (1821); The Divina Pastora, 17 U.S. (4 Wheat.) 52 (1819); Estonian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 447 (Ct. Cl. 1953); Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir. 1951); The Maret, 145 F.2d 431 (3d Cir. 1944); cases cited note 304, *supra. See also* Dickinson, *The Unrecognized Government or State in English and American Law,* 22 MICH. L. REV. 29, 118 (1923).

[314] *See* D. O'CONNELL, *supra* note 270, at 195-97.

[315] *Cf.* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Luther v. James Sagor & Co., [1921] 1 K.B. 456.

[316] Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 39, 213 N.Y.S.2d 417, 419 (1961).

[317] *See, e.g.,* Banque De France v. Equitable Trust Co., 33 F.2d 202 (S.D.N.Y. 1929); M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); *In re* First Russian Ins. Co., 255 N.Y. 428, 175 N.E. 118 (1931); Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 170 N.E. 479 (1930); James & Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 364 (1928); Sokoloff v. Nat'l City Bank, 239 N.Y. 158 (1924); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923).

> over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact, not a theory.[318]
>
> Exhibitions of power may be followed or attended by physical changes, legal or illegal. These we do not ignore, however lawless their origin, in any survey of the legal scene. They are a source at times of new rights and liabilities. . . . The everyday transactions of business or domestic life are not subject to impeachment, though the form may have been regulated by the command of the usurping government. . . . To undo them would bring hardship or confusion to the helpless and the innocent without compensating benefit.[319]

Yet, of these cases which involved the acts or decrees of the unrecognized Soviet government, only four can be said to have been decided on the basis of this doctrine.[320] And, only one of the four cases is justifiable *solely* on a theory of acknowledgment of objective realities.[321]

Of the other cases, two involved alternate grounds of decision. One apparently rests on the ground that the proceeding was an equitable one, in which not all of the proper parties were joined, thus subjecting the defendant to possible double liability.[322] The other involved a different alternate ground of decision: that plaintiff, a French citizen, whose government had recognized the U.S.S.R., might thereby be precluded from suing to recover gold, deposited in a New York bank by the unrecognized Soviet government, which had confiscated the gold from a Russian bank, wherein it had been deposited by plaintiff prior to the Revolution.[323]

The third case was decided solely on the ground that "[t]he Soviet decree restoring the gold standard is to be ranked with those 'every-day transactions of business or domestic life' that 'are not subject to impeachment, though the form may have been regulated by the command of the usurping government.' "[324] Yet, clearly, this type of currency regulation is entitled to be given legal effect on the theory that the Soviet government was acting as a representa-

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[318] Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 375, 138 N.E. 24, 25 (1923).

[319] Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 28, 170 N.E. 479, 481 (1930).

[320] Banque De France v. Equitable Trust Co., 33 F.2d 202 (S.D.N.Y. 1929); M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); *In re* First Russian Ins. Co., 255 N.Y. 428, 175 N.E. 118 (1931); Russian Reins. Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925), *motion for reargument denied,* 240 N.Y. 682, 148 N.E. 757 (1925).

[321] M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933), which involved title to property within the U.S.S.R. at the time of its confiscation, but within New York at the time of trial of the action.

[322] Russian Reins. Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925). *See* for basis of distinction, People v. Russian Reins. Co., 225 N.Y. 415, 175 N.E. 114 (1931); *In re* Second Russian Ins. Co., 250 N.Y. 449, 166 N.E. 163 (1929); First Russian Ins. Co. v. Beha, 240 N.Y. 601, 148 N.E. 722 (1925).

[323] Banque De France v. Equitable Trust Co., 33 F.2d 202 (S.D.N.Y. 1929).

[324] *In re* First Russian Ins. Co., 155 N.Y. 428, 175 N.E. 118 (1931).

tive of a recognized government.[325] Thus, the case cannot be said to be authority for the general proposition that objective realities can cause the juridical cognizability of non-recognized entities.

Two additional cases, it is true, gave legal effect to ministerial acts of the Soviet government. Neither, however, referred to the objective realities doctrine. One of them held that certificates, made before a notary in Russia, were admissible, as affidavits, in a federal court.[326] However, it is difficult to determine whether these certificates were admissible in spite of being made before an officer of an unrecognized government, or because they were validated by the retroactivity of Russia's recognition, or because they were made after Russia was recognized.[327] Moreover, notarization of certificates is a ministerial act to which legal effect may be given on the theory of representative recognition.[328] The other case gave legal effect to birth certificates authenticated by officials of the non-recognized Soviet government,[329] but only because supported by *other* proof of birth.

The remainder of the Russian recognition cases denied legal effect to acts and decrees of the Soviet government, on the ground of non-recognition, simultaneously enunciating, with great vigor, the theory that, under other circumstances, objective realities would require legal effect to be given to these acts and decrees.[330]

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[325] *See, e.g.,* Delmas v. Ins. Co. 81 U.S. (14 Wall.) 661 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1868); pt. IV B 4 *infra.*

[326] Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934).

[327] *Id.*

[328] *See* pt. IV B 4 *infra.*

[329] Werenjchik v. Ulen Contracting Corp., 229 App. Div. 36, 240 N.Y.S. 619 (1930).

[330] Non-recognition held to preclude an unrecognized government from being either a party plaintiff or a party defendant in any action or proceeding brought in the courts of the non-recognizing state. Nankivel v. Omsk All-Russian Gov't, 237 N.Y. 150, 142 N.E. 569 (1923); Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923). *See also* The Rogdai, 278 F. 294 (N.D. Cal. 1920). Non-recognition further held to render Soviet confiscatory decrees ineffective to terminate the corporate existence of banks or insurance companies, whether incorporated in Russia and doing business in the United States, or incorporated in the United States and doing business in Russia. *In re* Northern Ins. Co., 255 N.Y. 433, 175 N.E. 120 (1931); People v. Russian Reins. Co., 255 N.Y. 415, 175 N.E. 114 (1931); Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 170 N.E. 470 (1930); *In re* Second Russian Ins. Co., 250 N.Y. 449, 116 N.E. 163 (1929); Fred S. James & Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 364 (1928); Joint Stock Co. v. National City Bank, 240 N.Y. 368, 148 N.E. 552 (1925); Fred S. James & Co. v. Second Russian Ins. Co., 239 N.Y. 248, 146 N.E. 369 (1925); Sokoloff v. National City Bank, 239 N.Y. 158 (1924). These decrees, moreover, were held to be ineffective to affect the title to property situated in the United States at the time when they were enacted. See cases cited *supra* this paragraph. *See also* Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 174 N.E. 299 (1931). In this connection, it is of interest to note that *subsequent to the recognition of the U.S.S.R.* legal effect *also* was denied to the extraterritorial operation of these decrees. Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 280 N.Y. 286, 20 N.E.2d 758 (1939); United States v. President & Directors of the Manhattan Co., 276 N.Y. 396, 12 N.E.2d 518 (1938); Vladikavkazsky R.R. Co. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934). This accords with the general rule that extraterritorial effect

The objective realities theory has received only sporadic acceptance in the American courts since the era of non-recognition of the U.S.S.R. The first opportunity for its application arose in the Baltic cases — those involving the failure of the United States to recognize the incorporation of Latvia, Lithuania, and Estonia, into the U.S.S.R. These cases fall into three categories.

The first denies extraterritorial effect to the nationalization decrees of the new, non-recognized, governments,[331] on the ground that these governments were unrecognized.[332] It is clear, however, that the decisions would have been the same had these governments been recognized.[333]

The second group of cases denied legal effect to the ministerial acts of the non-recognized governments, equating non-recognition with judicial non-existence.[334] The third group, however, adhering to the objective realities theory, reached a contrary result.[335] It gave legal effect to such ministerial acts. This group also includes the decisions permitting New York corporations, as agents of the non-recognized governments, to bring actions, in federal courts, on behalf of their principals.[336]

The most extraordinary extension of the objective realities theory occured in *Bank of China v. Wells Fargo Bank & Union Trust Co.*[337] Implicit in the court's opinion is the intimation that, had it been unable to hold that the recognized claimant government also was one in fact, it would have felt constrained to acknowledge objective realities by awarding the funds in controversy to the non-recognized claimant government.[338] Yet, clearly, an executive policy of non-recognition requires that, the objective realities notwithstand-

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will be denied to the acts of state even of recognized governments. Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956); Iraq v. First Nat'l City Bank, 241 F. Supp. 567 (S.D.N.Y. 1965); Bollack v. Societe Generale, 263 App. Div. 601, 33 N.Y.S.2d 986 (1942); The Jupiter (No. 3), [1927] P. 122, *aff'd.* [1927] P. 250; The 'El Comdado,' [1939] 63 Lloyd's List. L.R. 330. The United States Supreme Court subsequently held that such extraterritorial effect was required by the Litvinov Assignment. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

[331] Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir. 1951); The Maret, 145 F.2d 431 (3d Cir. 1944); The Florida, 133 F.2d 719 (5th Cir. 1943); Latvian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 717 (Ct. Cl. 1953); Estonian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 447 (Ct. Cl. 1953); A/S Merilaid & Co. v. Chase Nat'l Bank, 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. 1947); *In re* Grauds' Estate, 43 N.Y.S.2d 803 (Sur. Ct. 1943).

[332] *See* cases cited note 331, *supra.*

[333] *See* note 330 *supra.*

[334] *See* cases cited note 304 *supra.*

[335] The Denny, 127 F.2d 404 (3d Cir. 1942); *In re* Luberg's Estate, 19 App. Div. 2d 370, 243 N.Y.S.2d 747 (1963).

[336] The Maret, 145 F.2d 431 (3rd Cir. 1944). *See also* Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934); Upright v. Mercury Bus. Mach. Co., 13 App. Div. 2d 36 (1st Dep't 1961).

[337] For the facts in this case, see the textual material pertaining to note 306 *supra.*

[338] 104 F. Supp. 59 (N.D. Cal. 1952).

ing, the recognized government always must prevail in any controversy between itself and its unrecognized counterpart.[339]

The most recent application of the objective realities theory is to be found in *Upright v. Mercury Business Machines Co., Inc.*[340] The case involved an action by the assignee of a trade acceptance, drawn on and accepted by the defendant in payment for typewriters, sold to it by an East German corporation, allegedly a creature of the non-recognized East German government. The New York Appellate Division held that allegations of non-recognition of the East German government are insufficient, standing alone, to avoid liability on transactions with such government. According to the opinion of the court, a valid defense must assert a violation of public policy with respect either to the underlying sale, or to the assignment of the trade acceptances. The court said, *inter alia*:

> A foreign government, although not recognized by the political arm of the United States Government, may nevertheless have *de facto* existence which is juridically cognizable. . . . The lack of jural status for such government or its creature corporation is not determinative of whether transactions with it will be denied enforcement in American courts, so long as the government is not the suitor.[341]

The result in *Upright* clearly is correct. Yet the reasoning of the court goes beyond the necessities of the situation. It would have been sufficient to say, as did the English courts in a similar situation, that the acts of the East German government are entitled to be given legal effect in their character, by attribution, as acts of the recognized government of the U.S.S.R.[342]

The objective realities theory has been adopted outside the United States, although not expressed in precisely the same manner.[343] The result, in these cases, is to attribute to a non-recognized government a civil personality, distinct from its official personality.[344]

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[339] *See, e.g.,* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Union of Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941).

[340] 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961).

[341] *Id.* at 38, 213 N.Y.S.2d at 419.

[342] Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.); Greig, *The Carl-Zeiss Case and the Position of an Unrecognized Government in English Law,* 83 LAW Q. REV. 96 (1967).

[343] *See, e.g., In re* Sack, Case No. 35 (Argentine, Camara Federal of Rosario Nov. 11, 1936) *reprinted in* 1935-1937, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 117; 'Exportchleb' Ltd. v. Goudeket, Case No. 36 (Holland, Dist. Ct., Amsterdam, Feb. 15, 1935) *reprinted in* 1935-1937, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 117; Russian Trade Delegation in Turkey v. Levant Red Sea Coal Co., Case No. 35 (Egypt, Tribunal of Alex., Mar. 1933) *reprinted in* 1933-1934, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 82.

[344] 'Exportchleb' Ltd. v. Goudeket, Case No. 36 (Holland, Dist. Ct., Amsterdam Feb. 15, 1935) *reprinted in* 1935-1937, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 117; Russian Trade Delegation in Turkey v. Levant Red Sea Coal Co., Case No. 35 (Egypt, Tribunal of Alex., Mar. 1933) *reprinted* in 1933-1934, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 82.

4. International Recognition — The Golden Mean

The objective realities approach to non-recognition situations is an extreme reaction to the orthodox approach: that non-recognition of an international entity causes it to be judicially non-cognizable. Until recently, the exponents of neither approach would acknowledge the existence of a third alternative.[345] Yet, this alternative exists. Moreover, its establishment, as the standard for determining whether to attribute the consequences of legality to non-recognition situations, is essential to the elimination of the difficulties inherent in the existing approaches.

This third alternative may be termed representative recognition. It is an expression of the principle, long established in international law, of continuity of the State. This principle requires the limited attribution, to non-recognition situations, of the consequences of legality of statehood or government. To the extent that it requires this attribution, it is a valid substitute for international recognition as a condition precedent thereto, and constitutes an adequate standard for determining the legal effects of non-recognition situations. Moreover, application of this standard is inherently incapable of contravening the policy of the political department.

In this connection, however, it must be borne in mind that the principle of continuity of the State customarily is applied under two sets of circumstances. On the one hand, it is applied by the parent State, or recognized government. On the other, it is applied by an unrelated State. Both varieties of application may be made either before or after the cessation of hostilities. The conditions precedent to the former type of application are not necessarily identical with those of the latter. For the latter type of application involves policy considerations not involved in the former — at least when the former occurs after the cessation of hostilities. To wit, the necessity of the unrelated entity to avoid affront to the recognized entity, or inadvertent recognition of the non-recognized entity.

a. Continuity of the State — Representative Recognition

Inherent in the nature of a State, within the meaning of international law, is the possession of a government.[346] Hence, international recognition of statehood, whether initial or continued, implies that the entity, recognized as a State, has a government.[347] Moreover, changes in the government of a State, whether accomplished in a constitutional manner or by revolution, do not interrupt the legal continuity of the State, insofar as international law is

[345] Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.).
[346] H. KELSEN, *supra* note 262, at 279-80.
[347] *Id.*

concerned.[348] Nor do they affect the rights or liabilities of the State, since the State is the actual owner of the property, its government being but the representative of the national sovereignty.[349]

Hence, where there has been an objectively real, but unrecognized, change in the government of a recognized State, the judiciaries of non-related States must consider "the ancient state of things as remaining unaltered," until international recognition of this change has been granted by their political departments.[350] For example, where a government continues to be recognized as such, despite the fact that it has been overthrown, its diplomatic representatives must be considered as the accredited representatives of the State,[351] entitled to sue on its behalf.[352]

Moreover, upon international recognition of an objectively real change in the government of a recognized State, the newly recognized government is considered as a continuation of the formerly recognized government.[353] It succeeds to the property, rights, and liabilities of the State, as the agent thereof, by right of representation.[354] It further is entitled to be substituted for the formerly-recognized government in pending litigation involving the rights of the State.[355] And, its right to sue, on a claim belonging to the State, is barrable by the running of the Statute of Limitations against

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[348] *Id.* at 264.

[349] *See, e.g.,* The Sapphire, 78 U.S. (11 Wall.) 164 (1870); Lehigh Valley R.R. Co. v. Russia, 21 F.2d 396 (2d Cir. 1927), *aff'g* 293 F. 135 (S.D.N.Y. 1923); Haile Selassie v. Cable & Wireless Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.). *See also* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941).

[350] Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852); Rose v. Himely, 8 U.S. (4 Cranch) 240 (1808); Lehigh Valley R.R. Co. v. Russia, 21 F.2d 396 (2d Cir. 1927); Clark v. United States, 5 F. Cas. 932 (No. 2838) (D. Pa. 1811). *See also* Dahan & Dorra Bros. v. Tchoureff, Case No. 34 (Egypt Ct. App., 1st Chamber, June 24, 1936) *reprinted in* 1935-1937 LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 115; Lesser v. Rotterdamsche Bank (Ct. 1st Instance Rotterdam, The Netherlands Dec. 30, 1953), 2 Nederlands Tijdschrift voor Int'l Recht 420, 50 AM. J. INT'L L. 441 (1956).

[351] Russian Gov't v. Lehigh Valley R.R. Co., 293 F. 135 (S.D.N.Y. 1923); *aff'd,* 21 F.2d 396 (2d Cir. 1927); Canadian Car & Foundry Co. v. American Can Co., 253 F. 152 (S.D.N.Y. 1918); United States v. Trumbull, 48 F. 94 (S.D. Cal. 1891).

[352] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941); Russian Gov't v. Lehigh Valley R.R. Co., 293 F. 135 (S.D.N.Y. 1923); Canadian Car & Foundry Co. v. American Can Co., 253 F.152 (S.D.N.Y. 1918).

[353] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); The Sapphire, 78 U.S. (11 Wall.) 164 (1870); Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941); Haile Selassie v. Cable & Wireless Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.).

[354] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); The Sapphire, 78 U.S. (11 Wall.) 164 (1870); Haile Selassie v. Cable & Wireless Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.).

[355] The Sapphire, 78 U.S. (11 Wall.) 164 (1870); Haile Selassie v. Cable & Wireless Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.).

its recognized predecessor, despite the fact that it was precluded, by non-recognition, from bringing timely suit.[356]

Correlatively, the perpetual legal continuity of a recognized State requires that it be bound by, and responsible for, the acts of its government.[357] Similarly, a recognized government is bound by, and responsible for, the acts of its predecessors.[358] These principles apply to the acts of a recognized government.[359] They also apply to the acts of a non-recognized government which, thereafter, is accorded international recognition.[360] They further apply, to a limited extent, to the acts of a government which, although never accorded international recognition, has succeeded in establishing itself in power.[361] They even are applicable, in yet a lesser degree, to the acts of a government which neither succeeded in establishing itself in power, nor ever was accorded international recognition.[362] Their application, in the latter two situations, might be described as representative recognition. For, it depends upon the extent to which the *de facto* power can be deemed to be acting as the representative of the recognized government.

Thus, international recognition, although retroactive in effect, validating all the actions of the newly recognized government from the actual commencement of its existence,[363] cannot operate to nullify any actions properly taken, prior to such recognition, by the

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[356] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941); *cf.* Steingut v. Guaranty Trust Co., 58 F. Supp. 623 (S.D.N.Y. 1944), holding that, where the claim sued upon belonged originally to the Russo-Asiatic Bank, rather than to the formerly-recognized government of Russia, the latter could not have sued upon the claim during the period of non-recognition of the U.S.S.R.; that the statute of limitations does not start to run until there exists someone capable of enforcing the claim; and that, therefore, the Soviet Government, which acquired the claim by confiscation during the period of its non-recognition, was not barred by the statute of limitations from suing thereon, since it could not have brought suit until recognized.

[357] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Republic of Peru v. Peruvian Guano Co., [1887] 36 Ch. D. 489; The King of the Two Sicilies v. Willcox, 1 Sim. (n.s.) *301 (1851); Silvanie, *Responsibility of States for Acts of Insurgent Governments,* 33 AM. J. INT'L L. 78 (1939); Stinson, *Recognition of De Facto Governments and the Responsibility of States,* 9 MINN. L. REV. 1 (1924).

[358] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Republic of Peru v. Peruvian Guano Co., [1887] 36 Ch. D. 489; *see also* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938).

[359] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Civil Air Transp. Inc. v. Central Air Transp. Corp., [1952] 2 All E.R. 733 (P.C.), *aff'd,* [1953] A.C. 70; Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v. Boguslawski, [1953] A.C. 11, *aff'g,* [1950] 2 All E.R. 355 (C.A.); Stinson, *supra* note 357.

[360] Silvanie, *supra* note 357. *See also* cases cited note 363, *infra.*

[361] The King of the Two Sicilies v. Willcox, 1 Sim. (n.s.) *301 (1851); D. O'CONNELL, *supra* note 270, at 99-102; Silvanie, *supra* note 357; Stinson, *supra* note 357.

[362] United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819); D. O'CONNELL, *supra* note 270, at 99-102; Silvanie, *supra* note 357.

[363] Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Underhill v. Hernandez, 168 U.S. 250 (1897); Yucatan v. Argumendo, 92 Misc. 547, 157 N.Y.S. 219 (Sup. Ct. 1915); Luther v. James Sagor & Co., [1921] 3 K.B. 532 (C.A.).

previously recognized government on behalf of the State.[364] Nor can the newly recognized government, by its unilateral action subsequent to recognition, nullify, or disclaim responsibility for, acts of its recognized predecessor — at least insofar as these acts affect non-related States, or their subjects.[365] Provided that the prior government is recognized before it is supplanted, its status when these acts occur is irrelevant to the operation of the rule.[366]

Moreover, the acts of a successfully established, but *never-recognized,* government, affecting non-related States or their subjects, are binding upon the State and its successor recognized government.[367]

The extent to which a State, and its recognized government, are bound by, and responsible for, the acts of a prior government, which failed either to establish itself or to receive recognition, is more difficult to determine. The problem has been presented in two contexts. On the one hand, it is raised in the courts of the parent State. On the other, it arises in the courts of non-related States.

(1) Attitude of the Parent State

The United States courts, for instance, in the post-Civil War era, gave legal effect to numerous acts of the seceded States, as distinguished from the Confederacy. Although their reasoning, in many cases, was based only impliedly upon the principle of legal continuity of the State,[368] in many others it was based expressly upon this principle.[369]

(a) Legal Continuity of the State by Implication — Necessity

The reasoning of this approach appears to be that (1) every State must have a government to preserve order, and to perform certain other indispensable governmental functions; (2) the su-

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[364] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Civil Air Transp. Inc. v. Central Air Transp. Corp., [1953] A.C. 70; Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v. Boguslawski, [1953] A.C. 11. However, actions of the previously recognized government, which affect persons or property then situate under the control of the newly recognized government, are nullified by subsequent recognition of the latter government. *Id.*

[365] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Republic of Peru v. Peruvian Guano Co., [1887] 36 Ch. D. 489; Silvanie, *supra* note 357.

[366] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Republic of Peru v. Peruvian Guano Co., [1887] 36 Ch. D. 489; Silvanie, *supra* note 357.

[367] Silvanie, *supra* note 357; Stinson, *supra* note 357; *Arbitration Between Great Britain and Costa Rica, Opinion and Award of William H. Taft, Sole Arbitrator,* 18 AM. J. INT'L L. 147 (1924).

[368] Baldy v. Hunter, 170 U.S. 388 (1897); Williams v. Bruffy, 96 U.S. 176 (1877); Delmas v. Ins. Co., 81 U.S. (14 Wall.) 661 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1868); Mauran v. Ins. Co., 73 U.S. (6 Wall.) 1 (1867). *See also* United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

[369] *See, e.g.,* Ketchum v. Buckley, 99 U.S. 188 (1878); Keith v. Clark, 97 U.S. 454 (1878); Williams v. Bruffy, 96 U.S. 176 (1877); United States v. Ins. Cos., 89 U.S. (22 Wall.) 99 (1874).

premacy of insurgents or invaders, over the territory occupied by them, necessitates the obedience of its occupants to acts and decrees not hostile to the legitimate government; (3) therefore, to the extent only that a non-recognized government performs these indispensable governmental functions, which the legitimate government is unable to perform, its acts must be given the same force and effect as if performed by the legitimate government.

Thus, the United States Supreme Court indicated that it would give legal effect to those rebel acts and decrees relating to the preservation of order; maintenance of police regulations; prosecution of crimes; protection of property; enforcement of contracts; celebration of marriages; settlement of estates; transfer and descent of property; and related matters.[370] Specifically it did, in fact, give effect to the issuance of currency;[371] investment by a guardian, of Confederate funds of his ward, in Confederate bonds;[372] and the imposition of customs duties.[373] In this connection, the United States Supreme Court stated:

> To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. . . . But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible. . . .
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> They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection.[374]

This approach of the United States Supreme Court was adopted as one of the bases of decision in *Madzimbamuto v. Lardner-Burke; Baron v. Ayre*.[375] These cases, arising before the Crown appointed and authorized High Court of Rhodesia, involved the legality of the acts of the non-recognized government of Southern Rhodesia in detaining plaintiffs without trial. Consequently, they involved the legality of the non-recognized government itself, in view of its unilateral abandonment of its status as a British colony. Although declaring illegal the Rhodesian government of Ian Smith, and the

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[370] Baldy v. Hunter, 170 U.S. 388 (1897).

[371] Delmas v. Ins. Co., 81 U.S. (14 Wall.) 661 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1868).

[372] Baldy v. Hunter, 170 U.S. 388 (1897). *Contra,* Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873) (where the funds invested were non-Confederate in origin).

[373] United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

[374] Thorington v. Smith, 75 U.S. (8 Wall.) 1, 11-12, (1868). *See also* United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

[375] N.Y. Times, Sept. 10, 1966 § 1, at 1, cols. 2-3, *id.* at 10, cols. 4-6; Welsh, *The Constitutional Case in Southern Rhodesia,* 83 LAW Q. REV. 64 (1967).

1965 Constitution enacted by it, the High Court ruled that legal effect must be given to "such measures of the effective government, both legislative and administrative, as could lawfully have been taken by the lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order."[376]

Uniformly, however, legal effect has been denied to acts and decrees, of the insurgent or invading government, which were hostile to the interest of the legitimate government.[377] Moreover, legal effect has been denied to the creation, by an insurgent government, of courts not existing under the legitimate government.[378]

(b) Express Application of the Doctrine of Legal Continuity of the State

The United States Supreme Court held, expressly, in a number of cases, that the existence of rebellion did not cause the States to cease to be States, nor their citizens to cease to be citizens of the Union;[379] that the seceded States, during and after the rebellion, continued to be the same political organizations, possessing the same laws and form of government, as prior thereto;[380] and that, therefore, all acts of the seceded States, during the period of rebellion, were valid and binding upon the State thereafter, except when done in aid of the rebellion, or in conflict with the Constitution or laws of the United States.[381] The distinction is exemplified by two types of situations. On the one hand, for example, secession was considered to be incapable of affecting the jurisdiction of the courts of the seceded States, or their power to render valid judgments.[382] On the other hand, confiscation, by the rebels, of the property of loyal citizens, uniformly was denied legal effect.[383]

This basis of decision also was adopted by the High Court of Rhodesia, as an additional ground of decision in *Madzimbamuto v.*

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[376] N.Y. Times, Sept. 10, 1966, § 1, at 1, col. 3.

[377] Ford v. Surget, 97 U.S. 594 (1878); Dewing v. Perdicaries, 96 U.S. 193 (1877); Williams v. Bruffy, 96 U.S. 176 (1877); Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439 (1872); Texas v. White, 74 U.S. (7 Wall.) 700 (1868). *See also* United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

[378] Hickman v. Jones, 76 U.S. (9 Wall.) 197 (1869). *See also* Dewing v. Perdicaries, 96 U.S. 193 (1877).

[379] Keith v. Clark, 97 U.S. 454 (1878); Texas v. White, 74 U.S. (7 Wall.) 700 (1868).

[380] Keith v. Clark, 97 U.S. 454 (1878); Williams v. Bruffy, 96 U.S. 176 (1877); Sprott v. United States, 87 U.S. (20 Wall.) 459 (1874); Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873).

[381] Keith v. Clark, 97 U.S. 454 (1878).

[382] Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873); White v. Cannon, 73 U.S. (6 Wall.) 443 (1867).

[383] Dewing v. Perdicaries, 96 U.S. 193 (1877); Williams v. Bruffy, 96 U.S. 176 (1877); Legal Tender Cases (Knox v. Lee and Parker v. Davis), 79 U.S. (12 Wall.) 457 (1870).

Lardner-Burke; Baron v. Ayre.[384] The court specifically rested its holding on that in *Texas v. White,*[385] to the effect that, notwithstanding its secession, Texas never ceased to be a State of the Union. The question remains, however, whether the particular acts of the non-recognized Rhodesian government, complained of in the instant case, are required to be recognized by the parent State, even under the theories advanced in this case.[386]

(2) Attitude of Non-Related States

Non-related States, moreover, have taken a narrower view of the acts of insurgents for which the parent State is responsible, or by which it is bound.

Prior to 1927, the view generally was taken that unsuccessful insurgents, being in no sense agents of the State, could not bind the State, or render it liable for their acts.[387] Necessity, however, required that certain exceptions be made to this rule. Thus, the legitimate government was not permitted to enforce a second payment of taxes or customs duties previously collected by the unsuccessful insurgents.[388] Moreover, provided that it receives the benefit thereof, the State is liable to pay for property seized by the rebels,[389] and, possibly, is bound by a contract made by the rebels with foreigners.[390] And, in order for the State to recover property, acquired by the rebels after the commencement of the rebellion, and impressed by them with the character of public property, it must recognize the authority of the rebels to that extent, and assume the burdens connected with the property.[391]

The General Claims Commission of 1927, in determining the liability of Mexico for acts of the unsuccessful Huerta administration, expanded the area of State responsibility. Consequently, the State further was considered to be bound by all acts of government routine performed by the unsuccessful rebels.[392] Included in this category are the "sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams (where post and

[384] Welsh, *supra* note 375, at 81-83.

[385] 74 U.S. (7 Wall.) 700 (1868).

[386] Welsh, *supra* note 375.

[387] Silvanie, *supra* note 357.

[388] *Id. See also* RALSTON & DOYLE, VENEZUELAN ARBITRATIONS OF 1903, Guastini Case, 730 (1904).

[389] RALSTON & DOYLE, VENEZUELAN ARBITRATIONS OF 1903, Mazzei Case, 693 (1904).

[390] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch.D. 348.

[391] The King of the Two Sicilies v. Willcox, [1851] 1 Sim. (n.s.) *301; United States v. McRae, [1869] L.R. 8 Eq. 68.

[392] Cook v. Mexico (General Claims Comm'n, U.S. and Mexico, 1927), 22 AM. J. INT'L L. 189 (1928); Davies v. Mexico (General Claims Comm'n, U.S. and Mexico, 1927), 21 AM. J. INT'L L. 777 (1927); United States *ex rel.* Hopkins v. United Mexican States (General Claims Comm'n, U.S. and Mexico, 1926), 21 AM. J. INT'L L. 160 (1927); Silvanie, *supra* note 357.

telegraph are government services), the sale of railroad tickets (where railroads are operated by the government), the registration of births, deaths, and marriages, . . . many rulings by the police, and the collection of several types of taxes."[393] Acts of the rebel government, in its personal character, however, did not bind the State, except to the extent that it benefitted thereby.[394] Included among the acts classified as personal, are the borrowing of money, purchase of war materials, and the forcible taking of property.[395]

More recently, two West German courts had occasion to disagree about the status of currency printed in West Germany for the illegal government of Rhodesia. The Frankfort public prosecutor had ordered the currency to be impounded. A civil court upheld his action, on the ground that the currency, bearing the signature of a member of the illegal government, was forged, and had not been ordered by an authorized official.[396] A criminal court, however, ruled that the currency was not forged.[397]

b. Attributing Legal Effects to the Acts of Non-Recognized Governments — A Proposed Standard.

The express and implied principles of continuity of the State operate in essentially the same manner, when applied to the acts of a non-recognized, usurping government. That is to say, each one establishes a standard of representative recognition.[398] Both principles consider the *de facto* power to have legal capacity only as a conservator for the recognized government, exercising purely ministerial powers. Hence, they attribute legal effect only to acts performed by it in its representative capacity. Correlatively, they deny legal effect to all acts performed by it on its own behalf, as an entity distinct from the recognized government.

Since the standard of representative recognition attributes legal effect only to those acts performed by the *de facto* power as the representative, in law, of the recognized government, its application, *ipso facto,* cannot constitute recognition of the *de facto* power as an independent government. Hence, it neither can affront the

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393 United States *ex rel.* Hopkins v. United Mexican States (General Claims Comm'n, U.S. and Mexico, 1926), 21 AM. J. INT'L L. 160 (1927).

394 United States *ex rel.* Hopkins v. United Mexican States (General Claims Comm'n, U.S. and Mexico, 1926), 21 AM. J. INT'L L. 160, (1927); Davies v. Mexico (General Claims Comm'n, U.S. and Mexico, 1927), 21 AM. J. INT'L L. 777 (1927); Cook v. Mexico (General Claims Comm'n, U.S. and Mexico, 1927), 22 AM. J. INT'L L. 189 (1928); Silvanie, *supra* note 357.

395 Silvanie, *supra* note 357.

396 N.Y. Times, Dec. 23, 1966, § 1, at 3, col. 4.

397 *Id.*

398 Although the principle of representation is explicit only in "continuity of the State," it is implicit in the doctrine of "necessity," which, therefore, can be discussed in these terms.

recognized government, nor subvert a policy of non-recognition. Consequently, this standard properly is applicable in undetermined non-recognition situations. It accords with the reasoning upon which the constitutive theory of recognition is based. It is, however, narrower in scope than the objective realities theory of recognition.

The standard of representative recognition, like that of objective realities, gives legal effect to all acts of governmental routine performed by the *de facto* power. It would, therefore, give legal effect to the execution, by officials of the non-recognized regime, of such documents as birth certificates, powers of attorney, and affidavits. Both standards, moreover, would give effect to laws "necessary to peace and good order among citizens" and to the ordinary conduct of their daily life. Laws of this type include those relating to status, personality, wills, descent and distribution, transfer of property, contracts, injuries to persons and property, and currency regulation.

At this point, the standards diverge. In the first place, it is possible that representative recognition warrants giving legal effect only to those laws which substantially conform, with respect to their form, content and enforcement, to their counterparts existing under the recognized government. The objective realities theory contains no such limitation. The latter theory, for example, would view corporations, created by an unrecognized, but effective government, as having legal existence, irrespective of the conformity of the incorporation laws to those of the recognized government.[399] Yet, those cases which based their acknowledgment of the legal existence of such corporations on the former theory, predicated their decisions on the continued existence of the incorporation laws of the recognized government,[400] or on laws substantially similar thereto.[401] Thus, the English courts recently gave legal effect to acts of the non-recognized East German government, on the theory that it had performed these acts as the representative of the U.S.S.R.; the latter being recognized by England as the *de jure* government of East Germany.[402]

Secondly, the objective realities theory gives legal effect to confiscations, by the *de facto* power, of property within its control

[399] Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961).

[400] Dahan & Dorra Bros. v. Tchoureff, Case No. 34 (Egypt Ct. App. 1st. Chamber, June 1936) *reprinted in* 1935-1937 LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 115. *See also* Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.); Greig, *The Carl-Zeiss Case and the Position of an Unrecognized Government in English Law*, 83 LAW Q. REV. 96 (1967).

[401] United States v. Insurance Cos., 89 U.S. (22 Wall.) 99 (1874).

[402] Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.).

at the time of the confiscation.[403] Representative recognition, however, denies legal effect to such confiscations, unless, perhaps, compensation is paid therefor.[404]

Thirdly, the objective realities theory conceivably might permit the *de facto* power, or its creatures, to maintain an action in the courts of the non-recognizing State.[405] Representative recognition, however, precludes this derogation of the rights of the recognized government.

The limitations of representative recognition, as compared to the objective realities theory, do not appear, however, to be so onerous as to constitute a denial of individual justice. Moreover, use of the standard of representative recognition eliminates the possibility that the consequences of legality of statehood or government will be attributed to non-recognition situations which public policy bars from being characterized as legal. For, representative recognition gives legal effect to the acts of a non-recognized State or government by treating them as the acts of a recognized State or government, rather than as the acts of an entity distinct from the recognized State or government. This is in conformity with the operation of the *de facto* public officer doctrine, which treats a purported public officer as *de facto* only if he assumes to act under lawful appointment and in a lawful manner. Otherwise, he is treated as a usurper.

5. Legal Illegality in International Law — A Recapitulation

Legal illegality manifests itself, in international law, as the attribution of the consequences of legality of statehood or government to non-recognized international entities. Assuming that this attribution is determined by a standard of representative recognition, it is possible to classify the juridical constructions of statehood and government, as required by the doctrine of relative recognition.

All recognized States and governments are juridical constructions of the first degree: For, attribution to them of the consequences of legality is barrable by no one. Non-recognized international entities, to which the standard of representative recognition is applicable, are classifiable as juridical constructions of the third degree. For, the attribution to them, of the consequences of legality of statehood or government, can be barred only by a limited num-

[403] M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933).

[404] Williams v. Bruffy, 96 U.S. 176 (1877); Legal Tender Cases (Knox v. Lee and Parker v. Davis), 79 U.S. (12 Wall.) 457 (1870).

[405] Bank of China v. Wells Fargo Bank & Union Trust Co., 92 F. Supp. 920 (N.D. Cal. 1950), *remanded for reconsideration,* 190 F.2d 1010 (9th Cir. 1951), *subsequent decision on remand,* 104 F. Supp. 59 (N.D. Cal. 1952); Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961).

ber of persons, and only in a limited manner. To wit, it can be barred by directive of the political department of the forum, or by unilateral action of the judiciary of the forum.

Relative recognition, therefore, is as functional in the sphere of international law, as it is in the sphere of municipal law. It eliminates the paradox of legal illegality from both spheres of law.

NOTE

IN RE GAULT AND THE COLORADO CHILDREN'S CODE

A MAJOR statutory revision of the juvenile court system of Colorado went into effect this summer. This legislation, known as the Colorado Children's Code,[1] applies the principles of due process to juvenile proceedings.

Only a few months earlier the United States Supreme Court had handed down its decision in the case of *In re Gault*.[2] That decision applied the Constitutional safeguards of due process to juvenile proceedings which may lead to incarceration in a state institution.

Gault will undoubtedly have an enormous effect on the juvenile courts of most states. In Colorado, however, the legislature anticipated the direction that juvenile law was pursuing and enacted the Code.

This note will examine the Code in depth and in so doing will point out the areas in which it has embodied the principles of due process as enunciated in *Gault*. In order to do this, it will be necessary to first look at the decision itself.

I. THE *Gault* DECISION

The facts in *Gault* are recited at length in the decision.[3] Briefly, they concern a fifteen year old boy, Gerald Gault, who was accused of having made a lewd telephone call to a neighbor. Gerald was taken into custody without his parents' knowledge. His parents had no formal notice of the charges against their son. In a very informal juvenile court proceeding Gerald was adjudicated a delinquent and committed to the State Industrial School for the period of his minority, unless released sooner. A writ of habeas corpus was dismissed by the Superior Court and dismissal was affirmed by the Arizona Supreme Court.[4] The United States Supreme Court received the case on appeal from this latter decision of the Arizona court.

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[1] Ch. 443, §§ 1, 2, [1967] Colo. Laws 993 [hereinafter referred to as the Code].

[2] 387 U.S. 1 (1967). 7-2 decision. The majority opinion was written by Mr. Justice Fortas. Justice Harlan dissented in part and Justice Stewart dissented.

[3] *Id.* at 4.

[4] Application of Gault, 99 Ariz. 181, 407 P.2d 760 (1965).

The United States Supreme Court limited its decision to the specific issues raised by the case: namely, a juvenile's right to notice of the charges against him, to counsel, to confrontation and cross-examination of the witnesses, to the privilege against self-incrimination, to have a transcript made of the proceedings, and to appellate review.[5] The application of the decision was limited to juvenile delinquency proceedings that might result in the child's being committed to a state institution.[6]

Extensive reference was made in the decision to the history of the juvenile court system. Nothing in the decision was intended to disturb the commendable practices of that system. For example the practice of processing juveniles separately from adults is not affected.[7] Notice was taken of the fact that from the inception of the juvenile court system, wide differences between the procedural rights of adults and of juveniles have been tolerated.[8] These differences were adopted in the hopes that treatment and rehabilitation of the juvenile would be easier in an informal atmosphere. In practice, however, that hope has never materialized. The Court noted that the failure to observe the requirements of due process had resulted in cases of unfairness to individuals and the denial of fundamental rights.[9] It stated that the primary and indispensable foundation of individual freedom is due process of law.[10] Its feelings are adequately summed up by the statement of the author of the majority opinion, Mr. Justice Fortas: "Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[11] Thus the application of due process requirements to juvenile proceedings that had been initiated in *Kent v. United States*[12] was continued.

The Court began by declaring that notice which would be constitutionally adequate in an adult civil or criminal proceeding[13] is required in delinquency hearings.[14] It stated specifically that the notice must be in writing, must contain the specific charge or factual allegations to be considered at the hearing, and must be given at

[5] 387 U.S. at 10. (The last two issues were not ruled upon.)

[6] *Id.* at 13.

[7] *Id.* at 23.

[8] *Id.* at 14.

[9] *Id.* at 19.

[10] *Id.* at 20.

[11] *Id.* at 18.

[12] 383 U.S. 541 (1966).

[13] Generally, the notice must recite the specific charge, be reasonably calculated to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections. *See* Armstrong v. Manzo, 380 U.S. 545 (1965); *In re* Oliver, 333 U.S. 257 (1948).

[14] 387 U.S. at 33.

the earliest practicable time,[15] in any case, sufficiently in advance of the hearing to permit adequate preparation of the case.[16] Even though Mrs. Gault actually knew of the nature of the charges against her son, the majority felt her knowledge did not excuse the lack of adequate notice and was not a waiver of the requirement of notice.[17] It was pointed out that one of the purposes of notice is to clarify the issues to be considered, and as the facts showed even the juvenile court judge was unclear about the precise issues of the case.[18]

Attention was turned next to the issue of right to counsel. The application of right to counsel which had earlier been applied in the adult area,[19] and then continued into juvenile waiver proceedings,[20] was with this case applied to those juvenile proceedings that carry the prospect of incarceration.[21] The Court notes that "the Due Process Clause of the Fourteenth Amendment requires that . . . the child and his parent must be notified of the child's right to be represented by counsel . . ."[22] and that the child has the right to have counsel appointed if unable to afford it.[23]

The Supreme Court had already ruled that the rights of confrontation[24] and cross-examination[25] are available to adults in state prosecutions under the Due Process Clause. *Gault* extended these rights into juvenile proceedings which may result in imprisonment and declared that absent a valid confession a delinquency determination and commitment to a state institution could not be sustained "in the absence of sworn testimony subjected to the opportunity for cross-examination . . . ."[26]

The Fifth Amendment privilege against self-incrimination has been interpreted by numerous court decisions to require that an accused adult be advised of his right to remain silent and that he make an intelligent waiver of that right before his incriminating statements may be used in court.[27] It has also been decided that the privilege applies in any adult proceedings, civil or criminal,[28] and

[15] *Id.*
[16] *Id.*
[17] *Id.* at 34 n.54.
[18] *Id.*
[19] Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).
[20] Kent v. United States, 383 U.S. 541 (1966).
[21] 387 U.S. at 36.
[22] *Id.* at 41.
[23] *Id.*
[24] Pointer v. Texas, 380 U.S. 400 (1965).
[25] Douglas v. Alabama, 380 U.S. 415 (1965).
[26] 387 U.S. at 57.
[27] *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).
[28] Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

that "it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used."[29] *Gault* requires that this same constitutional privilege against self-incrimination also be applicable to juveniles.[30]

Since *Gault* was reversed on the above grounds, the Court felt that it need not rule on the question of the necessity to provide a transcript of proceedings or the right to an appellate review of a delinquency determination.[31]

As can be readily seen, *Gault* applies far reaching Constitutional requirements to those juvenile proceedings which might result in incarceration.

Henceforth, a juvenile must be adequately notified of the charges against him and informed of his right to counsel, either self-retained or court appointed. Furthermore, an accused juvenile has the right to confront witnesses and to cross-examine their testimony, and he may avail himself of the privilege against self-incrimination.

This note will next examine the Colorado Children's Code and, where appropriate, will point out the areas in which the Code has embodied the requirements established by *Gault*.

II. THE COLORADO CHILDREN'S CODE

A. *The Intake Process*

1. Jurisdiction of the Court

Under the newly enacted Colorado Children's Code the juvenile court has a wide range of jurisdiction.[32] However, only two areas of jurisdiction are relevant to the present discussion. These are the code classifications of "delinquent child," and "child in need of supervision." A delinquent child is defined as a child between the ages of ten and eighteen who has violated any federal or state law except traffic or game and fish laws; any municipal ordinance, except traffic, which may be punished by a jail sentence; or any lawful order of the juvenile court.[33] The definition, however, does

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[29] Murphy v. Waterfront Commission, 378 U.S. 52, 94 (1964) (concurring opinion).

[30] 387 U.S. at 55.

[31] *Id.* at 58.

[32] Code § 22-1-4.

[33] *Id.* § 22-1-3(3), 22-1-3(17)(a). The exclusive nature of this jurisdiction may be subject to attack under the Colorado Constitutional Provision giving original jurisdiction to the district court in criminal matters. *See* COLO. CONST. art. 6, §9. *See also* Garcia v. District Court, 157 Colo. 432, 403 P.2d 215 (1965). A decision would seem to rest on whether the conduct of the juvenile delinquent can be characterized as criminal. At the time of this writing an appeal on this issue to the Colorado Supreme Court is imminent.

not apply to crimes of violence punishable by death or life imprisonment where the defendant is sixteen years of age or older.[34] At the same time, the definition does include any child under sixteen who has committed a traffic offense, "if his case is transferred from the county court to the juvenile court."[35]

It should be noted at the outset that the upper age limit of eighteen has been scaled down to sixteen in the case of capital offenses. This provision no doubt reflects a compromise between the juvenile court's goal of serving the welfare of the child,[36] and the goals of retribution and deterrence served by traditional penology. The Code at least reflects a legislative judgment that every child sixteen years of age or older who has committed a crime punishable by death or life imprisonment is incapable of benefitting from juvenile court services to the point where he ceases to be a menace to society. The validity of such a universal judgment is certainly open to doubt.

As stated above, the juvenile court has no jurisdiction of traffic offenses committed by a child sixteen or over, and only conditional jurisdiction if the child is under sixteen. This provision might indicate the belief that most traffic offenses do not involve moral turpitude, and the desire to conserve juvenile court resources for offenses that do involve moral guilt or contain evidence of future criminal conduct. If the foregoing is correct, it is perhaps regrettable that jurisdiction was not conferred on the juvenile court in at least some traffic cases. Illegal drag racing, hit and run, and drunken driving are offenses which often involve a high degree of moral turpitude, and the juvenile offender might be expected to benefit from juvenile court facilities. This section of the Code is quite confusing in that there are no directions as to the basis on which transfer of a child under sixteen to the juvenile court may be made. The Code also states that the juvenile court may refuse to accept jurisdiction in such a case.[37] Again no hints as to the criteria to be used are given. It would seem that here particularly the juvenile court should be given exclusive jurisdiction. The very fact that a child under sixteen is driving a car indicates a need for the services of the juvenile court.[38]

The second area of juvenile court jurisdiction to be discussed is that classified as "child in need of supervision." This term in-

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[34] *Id.* § 22-1-3(17)(b).

[35] *Id.* § 21-1-3(17)(c).

[36] *Id.* § 22-1-2(1)(b).

[37] *Id.* § 22-1-4(b)(ii).

[38] *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 24 (1967).

cludes those children who are habitually truant from school;[39] who have run away from home; who are beyond the control of their parents, guardians, or legal custodians;[40] or whose behavior is such as to endanger their own or others' welfare.[41] Such children have traditionally been within the jurisdiction of juvenile courts, and have previously been labelled as delinquent.[42] The change in nomenclature made by the Code is apparently an attempt to avoid the stigma of the term "delinquent" in those cases where a child has committed no real crime.

Hopefully, though, this clause will not be used as a vehicle for the imposition of a judge's personal morals. It could be interpreted as allowing a judge to dictate the length of a child's hair or the nature of his dress. If so, abuses could result.

2. Pre-Adjudication Procedure

The Code deals at some length with formal pre-adjudication procedure. A child may be taken into temporary custody by a law enforcement officer or juvenile court probation counselor when (a) in the presence of the officer he has violated a federal, state, or municipal law, other than traffic or game and fish law;[43] (b) there are reasonable grounds to believe that the child has committed an act which would be a felony if committed by an adult;[44] (c) the child is seriously endangered in his surroundings, or seriously endangers others, and immediate removal appears to be necessary for his protection or the protection of others;[45] or (d) there are reasonable grounds to believe he has run away from his legal custodian.[46]

The probation counselor may also commit a child to temporary custody if the child has violated the conditions of probation.[47] The Code further states that such temporary custody is not an arrest and does not constitute a police record. It is at least questionable whether such detention is actually an arrest by constitutional standards.[48] The drafters of the Code seem to recognize this by the incorporation of the "reasonable grounds" requirement. The section of the

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[39] Code § 22-1-3(18)(b).

[40] *Id.* § 22-1-3(18)(c).

[41] *Id.* § 22-1-3(18)(d).

[42] *See, e.g.,* COLO. REV. STAT. ANN. § 22-8-1(2)(1963).

[43] Code § 22-2-1(1)(b). This requirement is, of course, a departure from the general Colorado arrest statute. COLO. REV. STAT. ANN. 39-2-20 (1963). However it is in conformity with the arrest procedure followed in most jurisdictions. PROSSER, TORTS § 26, at 136 (3d ed. 1964).

[44] *Id.* § 22-2-1(1)(c).

[45] *Id.* § 22-2-1(1)(d).

[46] *Id.* § 22-2-1(1)(e).

[47] *Id.* § 22-2-1(2)(a), (b), (c).

[48] *See, e.g.,* United States v. Mitchell, 179 F. Supp. 636 (D.D.C. 1959) (holding that defendant was arrested when asked to accompany officer to a nearby call box).

Code stating that it is not an arrest, therefore, would seem to be aimed at avoiding the stigma which attaches to an arrest, rather than the avoidance of any constitutional requirements.

Assuming a child has been taken into custody under one or more of these provisions, the Code provides rather definite procedures concerning his further detention and release. The officer must notify the child's parents or guardian "without unnecessary delay."[49] He must inform the parent or guardian that if the child is placed in detention, he has the right to a prompt hearing to determine further detention.[50] However, the child must be released to the care of his parents or other responsible adult "unless his immediate welfare or the protection of the community requires that he be detained."[51] This determination is made by the police.[52]

As stated earlier, *Gault* requires certain steps to be taken to protect the privilege against self-incrimination.[53] The Code requires that no statement or admission shall be taken from the child for use as evidence unless the child and his parents or guardian are fully advised that the child has the right to remain silent and that any statements given by him may be used in evidence.[54] This fully conforms with the *Gault* requirement.

It should also be noted that *Gault* requires notice of the right to the presence of an attorney, either retained or court appointed.[55] The Code meets this requirement[56] and further provides that such notice of right to counsel be given at later stages of the proceedings as well.

Added insurance against improper questioning is set out by another Code section which prevents the detention of a child by law enforcement officers for a period longer than is necessary to obtain name, age, residence and other "necessary information" and to contact the parents or legal custodian.[57]

If the child is not released, he must be taken to a place of detention or shelter designated by the juvenile court.[58] The proper law enforcement official must then file a report with the court stating why the child was not released.[59]

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[49] Code § 22-2-2(1).
[50] *Id.*
[51] *Id.* § 22-2-2(2).
[52] *Id.* § 22-2-2(4).
[53] 387 U.S. at 55.
[54] Code § 22-2-2(3)(c).
[55] 387 U.S. at 36.
[56] Code § 22-2-2(3)(c).
[57] *Id.* § 22-2-2(3)(a).
[58] *Id.* § 22-2-2(3)(b).
[59] *Id.* § 22-2-2(4).

When the child arrives at the detention facility, he is no longer in the "temporary custody" of the police and the person in charge of the facility must notify the parent or guardian and the court accordingly.[60] He must also notify the parents or guardian of their right to a prompt hearing to determine further detention.[61] No child may be held in detention for more than forty-eight hours unless either a petition has been filed or the court orders further detention following a hearing.[62] The Code is silent as to what type of hearing is required in this instance. The Code provides that nothing therein shall be construed to deny the right to bail.[63]

A child may come to the attention of the juvenile court in an additional manner. If the court is informed by any person that a child is or appears to be within the court's jurisdiction, the court shall have an investigation made to determine whether the interests of the public or of the child require further action.[64] On the basis of that investigation, three choices are open to the court. The court may decide no further action is necessary,[65] authorize a petition to be filed,[66] or make an informal adjustment without a petition.[67] The first two alternatives are standard practice within the juvenile system.[68] However, the third alternative is an innovation, and would appear to be quite useful in the juvenile context. The court may make such an informal adjustment under the following conditions:

> The child, his parents, guardian, or other legal custodian were informed of their constitutional and legal rights including being represented by counsel at every stage of the proceedings;[69]
>
> The facts are admitted and establish prima facie jurisdiction, except that such admission shall not be used in evidence if a petition is filed; and[70]
>
> Written consent is obtained from the parents, guardian, or other legal custodian, and also from the child, if of sufficient age and understanding.[71]

These provisions are designed to keep the informal adjustment within acceptable limits. That is, the court may not make such an

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[60] *Id.* § 22-2-3(2).

[61] *Id.*

[62] *Id.* § 22-2-3(3).

[63] *Id.* § 22-2-3(7).

[64] *Id.* § 22-3-1(1).

[65] *Id.* § 22-3-1(2)(b).

[66] *Id.* § 22-3-1(2)(c).

[67] *Id.* § 22-3-1(2)(d).

[68] *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 14 (1967).

[69] Code § 22-3-1(2)(d)(ii).

[70] *Id.* § 22-3-1(2)(d)(iii).

[71] *Id.* § 22-3-1(2)(d)(iv).

adjustment without prima facie jurisdiction and without consent of the parties. In this way informal adjustment will not become arbitrary and oppressive in its operation. One potential tool of coercion does remain: the threat to file a petition if efforts at informal adjustment prove unsuccessful. It can only be hoped that the juvenile court will not use this threat as a means of gaining acceptance of what should be a voluntary agreement.

In the event that a petition is filed, the court is required to issue a summons which recites the substance of the petition, sets forth the rights of the child, and contains a notice of the right to have an attorney present at the hearing.[72] The summons must be served at least two days prior to the hearing.[73] One of the requirements of *Gault* was for an adequate and timely notice.[74] This summons provision would appear to satisfy that requirement. However, some question may arise as to whether two days allows adequate time to prepare. If not, a legislative extension of this time might be necessary to approach more closely the requirements of *Gault*.

B. *Adjudication*

When a petition is filed the next step is normally the adjudicatory hearing. However, if the petition alleges an offense which would be a felony if committed by an adult, and the child is sixteen years of age or older, the additional adjudicative process of a transfer hearing might become necessary.[75] The purpose of such a hearing is to determine whether the child should be tried as an adult in the district court. When such a petition comes before the court, several alternatives are possible: (1) the court may proceed as in any juvenile adjudication and hold no transfer hearing;[76] or (2) the court may continue the case for further investigation and transfer hearing if it determines that further investigation is in the interests of the child, his parents, guardian, or legal custodian[77] or that the child has not been represented by counsel and requests to be so represented at the transfer hearing.[78] The court may hold the transfer hearing immediately if it finds that no additional information is necessary to such a hearing,[79] and that the child and his parents, guardian or legal custodian have retained counsel or waived their right to counsel.[80]

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[72] *Id.* § 22-3-3(1).
[73] *Id.* § 22-3-3(7).
[74] 387 U.S. at 31.
[75] Code § 22-3-6(4).
[76] *Id.* § 22-3-6(4)(b).
[77] *Id.* § 22-3-6(4)(c)(ii).
[78] *Id.* § 22-3-6(4)(c)(iii).
[79] *Id.* § 22-3-6(4)(d)(ii).
[80] *Id.* § 22-3-6(4)(d)(iii).

If a transfer hearing is held, the court must consider only two issues, whether it would be contrary to the best interest of the *child* or of the public to retain jurisdiction.[81] Written reports and other material relating to the child may be considered, and those who prepare the reports are made subject to cross-examination.[82] The hearing is to be conducted according to the rules applicable to the normal adjudicatory hearing.[83] In order to retain jurisdiction the court must find that such retention is in the best interest of the child *and* of the public.[84]

The transfer provision may be viewed as a procedure whereby the juvenile court may divest itself of jurisdiction in any case where it feels that its unique services have no application to the circumstances of a particular case; where, for example, the child has become so hardened that punishment and deterrence, as opposed to individualized treatment and rehabilitation, seems the only answer.

However, the soundness of any transfer provision is nevertheless open to serious question.[85] After all, the sixteen year old burglar is still a juvenile and should be amenable to the same treatment as his counterpart who has committed a less serious offense. The Code, however, evidences a legislative judgment that this is not always the case, and that at least a court determination is required on the issue.

If the court retains jurisdiction, either because it decided transfer is not warranted or because no transfer hearing was held, it then proceeds to an adjudication of the guilt or innocence of the child. At this adjudication the child has the right to a jury of not more than six[86] and, in conformity to *Gault,* the right to be represented by counsel.[87] The court may appoint counsel without request where it is deemed necessary.[88] If a jury is not requested the case may be heard before a referee.[89] The referee acts in the same capacity as a judge. However, the parties have the right to a hearing before the judge instead of the referee[90] and they must be informed of

[81] *Id.* § 22-3-8(1).

[82] *Id.* § 22-3-8(3).

[83] *Id.* § 22-3-8(2).

[84] *Id.* § 22-3-8(5). It is beyond the scope of this note to inquire into all of the various social and penal theories which might be included under "interest of the child" *and* "interest of the public." However, it should be recognized that these concepts are broad enough to justify a decision on virtually any set of facts.

[85] Rubin & Shaffer, *Constitutional Protections For the Juvenile,* 44 DEN. L.J. 66, 82 (1967).

[86] Code § 22-1-6(4)(a)(i).

[87] *Id.* § 22-1-6(1)(a).

[88] *Id.* § 22-1-6(1)(c) (". . . necessary to protect the interest of the child or of other parties.").

[89] *Id.* § 22-1-10(1).

[90] *Id.* § 22-1-10(3).

this right by the referee.[91] After the hearing the referee must submit his findings and recommendations to the court, inform the parties of these findings and recommendations and notify them of their right to request a rehearing before the court.[92]

Whether the hearing is held before a judge, a judge and jury, or a referee, the Code prescribes certain rules. The rules of evidence provided by the Colorado Rules of Civil Procedure are applicable.[93] This, of course, insures confrontation, cross-examination of witnesses, and the right to present evidence. These same requirements regarding sworn testimony and cross-examination were laid down in *Gault*[94] and have been met by the Code. Compulsory process is also provided.[95]

Admission to the hearing is limited to those persons who have a direct interest in the case or the workings of the court or those individuals whom the parents or guardian wish to be present.[96] This section does not deny a public trial, since anyone whom the parents wish to be present, including the press, can attend. Quite obviously it evidences a legislative judgment that the desirability of avoiding unfavorable publicity to the child must, in the juvenile context, override the general public interest in the functioning of the court. It may, however, be argued that the provision is superfluous since another section of the Code states that no pictures, names, or addresses shall be published or given any publicity except by order of the court.[97]

The Code also provides that a verbatim record is to be made in any hearing,[98] an issue which the court refused to discuss in *Gault*. This is no doubt designed to facilitate possible appeals which may be taken from any order, decree or judgment of the juvenile court directly to the Colorado Supreme Court.[99] The burden of proof is the same as in the regular criminal courts, *i.e.*, beyond a reasonable doubt.[100] Upon a request by the court, the county attorney or district attorney represents the state at any hearing, including, of course, the adjudicatory and transfer hearings.[101] This would seem absolutely essential in any case where a defense attorney is present so as to prevent the judge from being forced into the

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[91] *Id.*
[92] *Id.* § 22-1-10(4).
[93] *Id.* § 22-1-7(1).
[94] 387 U.S. at 42.
[95] Code § 22-3-3(4).
[96] *Id.* § 22-1-7(1).
[97] *Id.* § 22-1-7(5)(a).
[98] *Id.* § 22-1-7(2).
[99] *Id.* § 22-1-12.
[100] *Id.* § 22-3-6(1).
[101] *Id.* § 12-1-6(3).

role of prosecutor. If the court finds that the allegations of the petition are not sustained beyond a reasonable doubt it must dismiss the petition and release the child from any detention or restriction.[102] A petition for a new hearing may be made on any of the grounds enumerated in rule 59 of the Colorado Rules of Civil Procedure.[103]

C. *Disposition*

If the allegations of the petition are supported beyond a reasonable doubt, the court must then consider the disposition to be made.[104] In making this determination the court may consider social studies or reports made by the probation department or other agencies designated by the court.[105] Parties making such reports are subject to cross-examination on the report,[106] and the court must inform the parties of this right.[107] The court may also have the child examined by a physician, psychiatrist or psychologist.[108] There is nothing in the Code which specifically gives the child the right to present evidence concerning proper disposition. However, the Code does state that the court shall hear evidence and that such evidence is not limited to the reports mentioned above.[109] This provision could be considered broad enough to allow such presentation, particularly since the Code recognizes an adversary element in the provision for cross-examination. It is regrettable that the legislature did not set forth this right more specifically if it in fact exists.

The court has broad authority in the formulation of what it considers a proper disposition. The disposition may embody what the Code terms an "order of protection." The order may be directed to the parent, guardian, or any other person who is a party to the proceeding. The Code states:

> (2) (a) The order of protection may require any such person:
> (b) To stay away from a child or his residence;
> (c) To permit a parent to visit a child at stated periods;
> (d) To abstain from offensive conduct against a child, his parent or parents, guardian, or any other person to whom legal custody of a child has been given;
> (e) To give proper attention to the care of the home;
> (f) (i) To cooperate in good faith with an agency:

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[102] *Id.* § 22-3-6(5).

[103] *Id.* § 22-3-17(1). Those grounds are (1) any irregularity which prevented a fair trial, (2) misconduct of the jury, (3) accident or surprise, (4) newly discovered evidence which could not, with diligence, have been discovered before trial, (5) insufficiency of the evidence, (6) error in law.

[104] *Id.* § 22-3-9(1).

[105] *Id.*

[106] *Id.* § 22-1-8(2).

[107] *Id.* § 22-1-8(3).

[108] *Id.* § 22-3-9(2).

[109] *Id.* § 22-3-9(1).

(ii) Which has been given legal custody of a child,

(iii) Which is providing protective supervision of a child by court order, or

(iv) To which the child has been referred by the court;

(g) To refrain from acts of commission or omission that tend to make a home an improper place for a child; or

(h) To perform any legal obligation of support.[110]

Many of these provisions have more obvious application to other areas of juvenile court jurisdiction, such as neglected children. However, a selective use of these provisions may also serve to reduce the causes of a particular child's delinquency. If the child has been adjudicated to be "in need of supervision" the court may choose from any one or more of the following alternatives in addition to those already stated:

(b) The court may place the child on probation or under protective supervision in the legal custody of one or both parents or guardian under such conditions as the court may impose;

(c) The court may place the child in the legal custody of a relative or other suitable person under such conditions as the court may impose, which may include placing the child on probation or under protective supervision.

(d) (i) The court may require as a condition of probation that the child report for assignment to a supervised work program or place such child in a child care or detention facility which shall provide a supervised work program, if:

(ii) The child is not deprived of the schooling which is appropriate to his age, needs, and specific rehabilitative goals;

(iii) The supervised work program is of a constructive nature designed to promote rehabilitation, is appropriate to the age level and physical ability of the child, and is combined with counseling from a probation counselor or other guidance personnel;

(iv) The supervised work program assignment is made for a period of time consistent with the child's best interest, but not exceeding ninety days.

(e) The court may place legal custody in the county department of public welfare or a child placement agency for placement in a foster home or child care facility, or it may place the child in a child care center.

(f) The court may order that the child be examined or treated by a physician, surgeon, psychiatrist, or psychologist, or that he receive other special care, and may place the child in a hospital or other suitable facility for such purposes.

(g) The court may require the child to pay for any damage done to persons or property, upon such conditions as the court deems best, when such payment can be enforced without serious hardship or injustice to the child.

(h) (i) The court may commit the child to the department of institutions for placement in the Colorado youth center, any other group care facility, or other disposition as may be determined by the department, as provided by law.

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[110] *Id.* § 22-3-10.

> (ii) No child committed to the department of institutions under the provisions of this section shall be placed initially in the Lookout Mountain school for boys, the Mount View girls' school, or any other training school as defined in section 22-1-3 (25), but may be transferred to one of these facilities by the department only as provided in section 22-8-4 (2).[111]

The provisions for work programs, and indeed the whole section, are obviously designed to avoid punitive elements as much as possible. The programs aim at rehabilitation. This seems particularly desirable since the "child in need of supervision" has done nothing which could be considered a crime within the normal usage of that word.

The provision regarding disposition of delinquent children is identical except that the restriction as to placement in Lookout Mountain boys' school and Mount View girls' school is removed, and a fine up to $50 may be imposed.[112] Again, the basic aim seems to be rehabilitation.[113] The apparent goal is to serve the needs of the child. The specific offense committed is only evidence of that need. This goal is further evidenced by another section of the Code which provides that no civil disability shall result from any adjudication made, nor shall such adjudication be admissible in any other court.[114]

D. *Post-Disposition*

Many, if not most, juvenile offenders are released on probation. The Code, as might be expected, provides rules regarding the probation process. Terms and conditions of probation must be given to the child in written form and shall be fully explained to him.[115] The juvenile court must review these terms and conditions and the progress of each probationary child at least once every six months.[116] The court may release the child from probation at any time, but he must be released if he has fulfilled the requirements for two years.[117] The jurisdiction of the court is then terminated.[118] The court is given the power to modify the terms and conditions of probation at any time without a hearing.[119] Grounds for the use of this power

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[111] *Id.* § 22-3-12(1).

[112] *Id.* § 22-3-13.

[113] However, as the Supreme Court in *Gault* pointed out, expectation may not always conform to result. In fact these "training schools" are often nothing more than glorified penal institutions which have the same detrimental effect on a child as they were created to remedy.

[114] *Id.* § 22-1-9.

[115] *Id.* § 22-3-18(1).

[116] *Id.* § 22-3-18(2)(a).

[117] *Id.* § 22-3-18(2)(b).

[118] *Id.*

[119] *Id.*

are not set forth. Hopefully this power will be used only to reflect changed or improved circumstances, and not as a tool of punishment for unproved subsequent offenses.

If the child has allegedly violated the terms of his probation, a hearing must be held. The hearing must be conducted in the same manner as the regular adjudicatory hearing.[120] If the court finds that probation has in fact been violated, it may take any measures which were open to it at the time of the original disposition.[121] These provisions give important protections to the alleged violator, and could be considered as a model for the comparatively backward adult probation system.[122]

Terms of incarceration or "commitment" differ between the "delinquent" and the "child in need of supervision." But within each group no differentiation is made as to the type of offense committed. A "child in need of supervision" is committed for an indeterminate period not to exceed two years.[123] However the court may renew the commitment for an additional two years or less upon petition of the department of institutions.[124] Although the petition must set forth the reasons for the request,[125] no hearing is given. On the other hand, an adjudicated delinquent may be committed for an indeterminate period not to exceed two years with possible parole supervision not to exceed an additional two years.[126] It is difficult to understand the reasoning underlying these provisions. Why should the "child in need of supervision," who has committed no crime, face a potentially longer confinement than the delinquent? This can perhaps be explained by the difference in the institutions to which the two types of offenders are committed.[127] It is submitted, however, that this difference in treatment is unfair on its face, and that a legislative revision should be seriously considered.

Any adjudicated delinquent who has been committed to the department of institutions must be considered for parole within one year after the commitment.[128] In considering parole, the parole board is to consider "the best interests of the child and the public."[129] This, of course, vests virtually total discretion in the parole board.

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[120] *Id.* § 22-3-18(3)(d)(i).

[121] *Id.* § 22-3-18(3)(d)(ii). However, the upper age limit for child care facilities is set at 18. Code § 22-8-6. It is unclear what happens to a child who is over 18 and has violated probation.

[122] *See, e.g.,* Note, *Legal Aspects of Probation Revocation,* 59 COLUM. L. REV. 3 (1959) for an appraisal of the shortcomings of the adult system.

[123] Code § 22-3-14(3)(a).

[124] *Id.*

[125] *Id.*

[126] *Id.* 22-3-14(3)(b).

[127] *Id.* § 22-3-14(2)(a).

[128] *Id.* § 22-9-2(1).

[129] *Id.*

Parole, as stated above, is for a maximum of two years, with a review required within one year.[130] The board has the authority to release the child from parole at any time.[131] Hearings on alleged parole violations are held before a hearing panel of the parole board after notice to the parties of the alleged violation.[132] No mention is made regarding the right to presence of an attorney or of the burden of proof required to sustain the allegations. There is also no provision for court review, although a rehearing may be held before the parole board.[133] It is regrettable that the Code, which is progressive in so many areas, chooses to follow the standard practice of vesting almost total discretion in the parole board with regard to grant of parole, terms and conditions, and revocation.[134] The parole process involves issues of liberty just as surely as the original adjudication, and procedural fairness and court review would play a major part in a truly enlightened system.

Any person who has been adjudicated a delinquent or a child in need of supervision may petition the court for expungement of his record two years after the termination of juvenile court jurisdiction or two years after his release from parole.[135] Such expungement shall be granted if the person has not been adjudicated a delinquent since the prior termination of jurisdiction or parole, if no such proceeding is pending, and if the court is satisfied that satisfactory rehabilitation has occurred.[136] If expungement is granted the records are sealed and the offense is "deemed never to have occurred."[137] Therefore in answer to any inquiry, the individual can honestly reply that he has never been adjudicated a delinquent. This is a farsighted attempt to avoid the stigma of a youth indiscretion where a sincere rehabilitation has occurred. As such, it should be welcomed by those concerned with the welfare of the juvenile.[138]

CONCLUSION

The Colorado Children's Code embodies the letter as well as the spirit of the recent United States Supreme Court case of *In re*

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[130] *Id.* § 22-9-2(2)(a).

[131] *Id.* § 22-9-2(2)(b).

[132] *Id.* § 22-9-6(4).

[133] *Id.* § 22-9-6(7).

[134] *See, e.g.*, O'Conner v. State Bd. of Parole, 270 App. Div. 93, 58 N.Y.S.2d 726 (1945).

[135] Code § 22-1-11(2)(a).

[136] *Id.* § 22-1-11(2)(c).

[137] *Id.* § 22-1-11(2)(d).

[138] *See generally* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 39 (1967).

Gault.[139] That spirit is adequately summed up by the following statements of the author of the majority opinion, Justice Fortas: "Under our Constitution, the condition of being a boy does not justify a kangaroo court";[140] and, "[d]ue process of law is the primary and indispensable foundation of individual freedom."[141]

The Code embodies the principles and requirements of due process as set forth in *Gault,* and, in addition, provides safeguards in areas in which the Court did not render a decision — notably in the areas of standard of proof, transcript of proceedings, and appellate review. The Code is the product of a farsighted legislative effort and could easily become a model for similar legislation in other states.

Brian M. Bell
James Rode

[139] 387 U.S. 1 (1967).
[140] *Id.* at 28.
[141] *Id.* at 20.

BOOK REVIEWS

PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION

BY RALPH SLOVENKO WITH GENE L. USDIN

Springfield: C. C. Thomas, 1966. Pp. xv, 202. $8.00

This scholarly and thoughtful examination of the problems of privileged communication in psychotherapy is a significant contribution to legal literature. It is also a presentation of one set of problems that arise between the legal and medical professions. Written by an eminent scholar of the law in collaboration with a psychiatrist, it both identifies legal problems and points to the value of effective collaboration between the two disciplines. While it offers definitive proposals about privilege in the practice of individual psychotherapy, it also points to many other problem areas in the practice of the mental health professions which are not so easily resolved.

For centuries physicians have practiced medicine under the assumption that communications between patient and physician are inviolate. The Hippocratic oath, considered to be the basic ethical statement of medical practice, insists that the physician never divulge that which is learned from a patient. Although the physician stands ready to break confidence in the event of serious danger to society, or to the patient himself, his training and his practice are based upon the necessity for confidential communication. When he discovers that there is no legal authorization for the confidentiality which he in his practice and the medical tradition have considered so essential (and there are sixteen such states) it is indeed an eye opener. The physician would be even more surprised to discover, as Slovenko points out, that the legal profession considers medical privileged communication to be a right existing only by statute. Slovenko suggests that the thirty-three statutes providing for the doctor-patient privilege are full of so many exceptions that they "closely resemble a sieve — they let through more than they keep out."

The author reviews the history of legal privilege and points to the Wigmore criteria as being the basis on which decisions have been made about enacting legislation for privileged communication. These criteria are (1) Does the profession require confidential communication? (2) Is the inviolability of that confidence essential

to the purpose of the relationship? (3) Is the relationship one that should be fostered? (4) Is the injury to the relationship through fear of disclosure greater than the expected benefit to justice in obtaining the testimony? Wigmore felt that the communication between attorney and client, between husband and wife, and between penitent and priest justified legislation for privileged communication. He felt that the justification for medical privilege was non-existent and that the real reason for medical men seeking such legislation was professional jealousy on their part. Other critics of medical privilege have argued that disease can be disclosed without shame to the patient, that physicians do not talk to patients anyway, and that patients do talk to physicians in those states without medical privilege.

The physician on the other hand feels that the tradition of medical confidentiality — a tradition expected to be observed by all members of society who become patients — justifies legalization of the practice. It should be noted that all states have legislated about the privileged nature of the attorney-client relationship.

This dichotomy is an excellent example of one of the misunderstandings between the professions of medicine and law. The physician would argue that patients do talk to physicians about many private aspects of their personal life in addition to the symptoms or physical findings of the one disease for which they are presently being treated. He would point out that the only non-emergency justification for the patient to permit his secrets and his body to be shown to the physician is the expectation of confidentiality whether it exists in law or not. Physicians might argue that laws are made by attorneys, interpreted by attorneys and enforced by attorneys and while the physician would respect the ethical standards of an attorney, he would claim a similar respect for the practice of his own profession. He might notice, however, that many attorneys with whom he has had contact advocate abrogation of the physician-patient privilege due to the supervening needs of the legal profession and full courtroom disclosure.

Slovenko recognizes that some professional groups have obtained a communication privilege and he notes that others feel that it is an unfair discrimination if the secrets of one profession are protected but not those of another. He replies that "the administration of justice cannot be influenced by inter-professional jealousies." While this is an admirable philosophical position, the reality is that several professional organizations have obtained legislation for privileged communication. Clinical psychologists have obtained legislation for a privilege the same as exists in the attorney-client relationship in eighteen of the twenty-four states which have statutory cer-

tification or licensure. When the inter-professional conflicts of psychiatry and clinical psychology are aired, this point has not infrequently been cited by the psychologist as evidence of his better position in a court of law.

In this book Slovenko does not retreat from the complexities of the confidential communication required in the mental health professions, which include psychiatry, clinical psychology, social work, counselling and others. He makes a very convincing case for privileged communication in individual psychotherapy showing that it meets the Wigmore criteria. He does not hesitate to point to problems which still need to be solved — such as the question of whether there is sufficient "confidentiality" to require a privilege in group or family psychotherapy or when a parent is present as in child therapy. He points to the special problem confronting the non-physician psychotherapist who would not fall in the normal "physician-patient" category — a problem which is by no means settled among the mental health professions themselves. He depicts the difficulties which arise in pre-litigation examinations and in screening examinations for employment. He notes also that there are legal complications involved in writing case reports or in clinical teaching exercises. Highlighting the problem the psychotherapist faces in regard to written records, he passes to the question of privilege for employees or colleagues of the psychotherapist.

Although Slovenko's book is principally concerned with the practices of mental health professionals, these same questions might well be raised for the entire practice of medicine. It is quite apparent that the techniques of practice are changing and that new types of professionals and sub-professionals are being trained to meet the health needs of our society. One of the consequences of the British health system is that legal privilege has been obtained for physicians in the mental health scheme because they are employees of a governmental minister and fall under his "cloak." In this country the consequences of new approaches to practice, including group medical practice, raise new questions for the courts. Although the issue of psychotherapy is well presented in Slovenko's book, he frankly states that there are more questions than answers.

Slovenko concludes the book with the suggestion that the problems of privileged communication might be resolved by the application of a general principle, such as that "a communication made in reasonable confidence that it will not be disclosed and in such circumstances that disclosure is shocking to the moral sense of the community should not be disclosed in a judicial proceeding." The alternative is comprehensive legislation covering every conceivable situation. The book is a well organized examination of the problem

and it has benefited from collaboration between the lawyer and the physician. It would suggest that more communication (not necessarily privileged) between the two professions might well lead to a better understanding of interdisciplinary problems and to more utilitarian legislation.

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A Sociology of Language

By Joyce O. Hertzler

New York: Random House, 1965. Pp. xii, 559. $8.95

> Communication is not an end in itself. It is, in fact, the elemental social process — the social technique upon which all social processes depend. Its elemental significance rests upon the fact that without it there can be no semantic transfer.

If the premise that communication is the touchstone of all social interaction is to be accepted and understood in depth, then language, the primary vehicle of communication, must be analyzed in terms of its sociological nexus. Such is the thesis of Professor Joyce O. Hertzler, in his book entitled, *A Sociology of Language.* Professor Hertzler engages in an extensive examination of the interplay between language systems and social systems in order to demonstrate the importance of language as a molder and motivator of society.

The book offers the reader a general orientation to the study of language and communication. However, the tone of *A Sociology of Language* suggests that a greater understanding of language and its sociological ramifications is necessary.

It is the purpose of this book review to consider some of Professor Hertzler's theories concerning the general relationship of language and society in order to relate them to the more specific issues contained in the relationship between language and law. In the following pages the general suggestion will be raised that there is a need for research in the area of law and communication: in the language of the courts as it affects the pronouncement of rules, in the language of the profession as it affects the client, and in the language of the law student as it affects his own peculiar socialization process of "legal professionalization."

The Language of the Courts

In Professor Hertzler's analysis of the relationship between language and society, one of the chief functions ascribed to language is its role as an agency of social control — "that is, its role in regulating, directing, adjusting and organizing the social conduct of individuals and groups in the interest of effective societal operation. Social control becomes impossible without a linguistic system."

If one adopts the proposition that the ultimate and official social control system is the legal system, and that the final arbiters of social control are the courts, then one is led to inquire into the relationship between language and the courts in order to determine

whether the task of social control is effectively being carried out. The elements of social control described by Professor Hertzler require the use of language in order that they may be communicated to society.

> The right kind of language is basic: (1) in understanding the prohibitions and requirements of behavior, (2) in presenting rules and directives, (3) in articulating public opinion behind these sanctions, and (4) in conducting the formal and informal agencies for administering and enforcing the sanctions.

The utilization of language by the courts as a function of social control is manifested by the pronouncement of rules of law. The observations made by Professor Hertzler seem to assume that some kind of stability underlies the rules and that the decisions of those vested with the power of social control are in some way predictable for a given state of facts. These assumptions follow the traditional philosophy of jurisprudence, which would reject speculation on or search for ultimate origins of sense experience. The principle of *stare decisis* demands stability and predictability in the law, and the traditionalist courts would look to the language of the past as precedent for the resolution of present conflicts in society.

Yet we must be aware that society itself is not always stable and that its norms are constantly changing to meet the times. The legal realists as long ago as the turn of the twentieth century raised grave doubts concerning the underlying stability and predictability of the legal process of social control. Their thesis maintained that law (as an expression of social control) is what the courts say it is from case to case. Predictability of pronouncements of social control to the legal realists was impossible without a clear understanding of the empirical facts underlying both the case at issue and the public policy of the times.

Although legal realism may have overstated its case somewhat in an effort to shatter the notion of dogmatic predictability in the legal system, it did give rise to a healthy skepticism concerning the "rule of law" and its place in the social control process. The word or rule should not stand alone as a symbol of behavioral control. Professor Hertzler discusses the importance of the word as a symbol for society, yet his observations are equally applicable to the symbolic importance of the rule of law.

> The importance of a symbol does not lie in its intrinsic properties; the symbol stands for, refers to, indicates *something else*. It is a representation of conceptualized things, actions, occurrences, qualities, or relationships — a surrogate or substitute, not the object or happening itself.

In the same way in which a word is a representation of conceptualized things and relationships, so also is a rule of law a conceptual representation of social attitudes and policies. The key to

predictability in the social control process lies in the empirical examination of the underlying social concepts which give rise to the rule expressed in a given decision. Without an analysis of these concepts, there is a further danger that through a semantic "process of abstraction" a rule of law may be generalized to such an extent that it is applied almost indiscriminately to a conflict. Such an application may in fact *prevent* the solution of a problem. Professor Hertzler notes that words as symbols tend to canalize perception and response, focusing attention only on some aspects of things or events and not on others. This may also be true for rules.

Some of the fundamental causes of this process of abstraction are engrained in legal method. Law students are taught to "brief" cases, to boil them down, presenting the facts, the issue, and the holding as the distilled ingredients of the controversy. Then they are asked to abstract from this distillate a "rule of the case," a general principle that will magically apply to all "similar" controversies. The fact of the matter is, however, that most controversies are not truly similar. Society is composed of individuals. Thus, when conflicts arise, they are *individual* conflicts, sociologically distinct from any other controversy, past, present, or future.

Given the notion of the uniqueness of every controversy, a *caveat* is posed for both the legal profession and society when one makes an isolated statement about what the law *is*. We cannot be certain about the basis of such a statement, and we do not know its factual or social referent. The rule standing alone is ambiguous, and, just as the general semanticist searches for the experiential referent of a word, so must we find empirically the sociological referent of the rule.

Language and law are both tools of society, and unless there is an awareness of how and why these tools are used, they have little meaning.

The Language of the Profession

The subject of "special" languages of the language community is considered in rather general terms in *A Sociology of Language,* and the problem of estrangement of special groups from society by virtue of their language is discussed. The legal profession is clearly capable of inclusion among the special classes of society, and "lawyer's talk" is distinct from the language of the lay community to a great extent. In an analysis of the relationship between language and the legal system, the problem is to isolate both the positive and negative effects of lawyer's talk with respect to the client. Given the capacity of a special language to isolate its speakers from the

general language community, is there a concurrent benefit to be derived in the lawyer-client communication situation?

In order to resolve this question, it is first necessary to understand the purposes of a special language. Professor Hertzler suggests that three general functions of special languages are readily discernible: (1) to mystify the ignorant, (2) to hide the special group's lack of knowledge and their unsolved problems, and (3) to cover up personal and emotional involvements. He suggests that one function of the language of the legal profession is that of concealment and defense, when he writes, "Some of the professions affect some terminology to enhance the mysteries of their craft. There is the solemn verbosity of lawyers . . . who thereby are able systematically to conceal their actual thoughts and feelings."

While there may be some truth to the observation that one function of lawyer's talk is for purposes of camouflage, this alone does not serve to answer the central issue. The answer lies partly in the awareness of what might be called the multiordinal aspect of all language. Words, including the words of lawyers, are incomplete symbols — their meaning is unknown until the context in which they are used is understood. The lawyer in court would indeed be expected to use his special language for a different purpose than the lawyer who is counselling a client, even though the words may sound the same in both situations. It must be realized that the lawyer-client situation carries with it a variety of role expectations on the part of the lawyer. A client seeking a divorce might require that the lawyer assume the role of psychologist or family counselor. Similarly, a corporation-client may require a businessman's role of the attorney. Each choice of roles demands an appropriate choice of language from the lawyer.

One of the primary functions of the lawyer's technical language is as a means of "conceptual shorthand." One word for the lawyer, such as "estoppel" or "due process" can serve to communicate a highly abstract and complex legal principle. Lawyer's talk, therefore, must of necessity be sufficiently specific for the articulation of a legal proposition, yet at the same time flexible enough to relate the proposition to reality in terms which the listener can comprehend. Otherwise, as Professor Hertzler notes, the lawyer becomes the victim of his own verbiage, rendering his language far more obscure than the abstract legal principles which it states.

Another aspect of the language of law, discussed earlier in the context of the language of the courts, is its function of social control. This same function can be performed by lawyer's talk in the counselling situation. The special language of law can create an aura of authority for the lawyer. In the normal lawyer-client situation, it is

assumed that the client has come to his attorney because he has a problem which only a lawyer can solve. The client looks to the attorney for advice, for some sort of answer. Thus, it is generally the lawyer who has the power to control the communication situation by his use of the language. Professor Hertzler refers to this power as "word grip."

> The verbal act — an utterance in the form of a word or a phrase, or a sequence of these — coupled with the manner in which it is uttered, is capable of setting in motion a force which influences, even controls, persons and situations. "Words are acts . . . and they function as acts."

Lawyer's talk can serve a useful persuasive function in a counselling situation; a function which ultimately depends for its success on the lawyer's skill in its use, based on an awareness of the relationship between language and social reality.

The lawyer-client situation presents an aspect of communication not always found in the study of the language of the courts in the case reports. This is the concept of "feedback," that is, the interplay of the communication of ideas between people. In the study of legal rules, the emphasis is predominantly on the written form contained in the statutes and case reports. There is no interplay of ideas to indicate that the rule contained in the written form has been *communicated* in a meaningful sense. The lawyer-client situation, however, provides an opportunity for the lawyer to test the value of his special language as a vehicle for the communication of rules through the principle of feedback. When a lawyer employs his lawyer's talk in a given counselling situation, his experiential frame of reference may be entirely different from that of his client, yet the abstract language spoken may trigger a response in the client based on his own experiential frame of reference. The abstract legal terminology may be open to a variety of interpretations by the client, yet communication will not be achieved.

Through the process of feedback, the alert lawyer can analyze the responses of his client to his use of lawyer's language in an attempt to make certain that their frames of reference converge. It may be that, since each person has somewhat different experiential referents for his environment, a complete "meeting of the minds" can never be achieved. However, once the lawyer becomes aware of the difficulties inherent in language, he can at least approximate "total communication" with his client.

Finally, the special language of the legal profession, by virtue of its capacity to exclude the non-speaking layman, has the ability to breed solidarity among its own members. Professor Hertzler

observes that this exclusive-inclusive effect is shared in common by all special language groups.

> The special language assists in keeping the distinction between member and non-member clear, and identifies the members of the in-group in contrast to the out-groups, setting them definitely apart from all others. Closely related to this is the fact that the special language has *a cohesive, solidarity-producing effect among its speakers.* It symbolizes the strength of the ties between them and serves as a "prop to in-groupness."

In terms of the legal profession, lawyer's talk seems to be a sort of double-edged sword. On the one hand, legal terminology and the misuse thereof may become as meaningless to the layman as jabberwocky, thereby confusing the clients the attorney seeks to serve. On the other, lawyer's language properly used can operate efficiently as both a persuasive communication vehicle with the client and also as a contribution to the sense of solidarity necessary for the maintenance of a profession.

THE LANGUAGE OF THE LAW STUDENT

The examination of the language of the law student as he undergoes the peculiar socialization process of "legal professionalization" is essential to the understanding of the relationship between language and law, since the way in which this future lawyer, legislator or judge utilizes the language will ultimately affect both the language of the profession and the language of the courts in the articulation and analysis of rules.

The entering law student comes from a variety of sociological backgrounds. He has already undergone a socialization process conditioned by his own particular environment, and therefore his language referents would be presumably well formed by the time he enters law school. Yet, in his first year of legal study, he must undergo a totally new socialization process, and this requirement must undoubtedly affect his use of language. The freshman law student soon learns that he is expected "to think and act like a lawyer." This new role expectation thrust upon the law student must carry with it the notion that part of the role of thinking and acting like a lawyer is talking like a lawyer. Once exposed to the legal terminology in his casebooks, the student soon learns (or think he learns) how lawyers talk. However, it has already been indicated that the way lawyers talk must be considered in terms of social reality. Professor Hertzler points out that

> every language . . . unavoidably has a tangential philosophical, more specifically, *a logical aspect,* if it is to serve its fundamental communicative purposes. This involves, first, the relationship of linguistic forms to facts. The user of the language must be concerned

> with validity, the extent to which his statements conform to reality, or else he is prating untruth, gibberish, or nonsense.

As the student progresses through his first year of legal studies and into his second and third, he may mellow somewhat in his eagerness to fulfill his new role expectation. He probably outgrows the notion that "to talk like a lawyer is to be a lawyer," yet some of its effects will probably remain with him and be reflected in his language. He has learned that such words as "estoppel," "battery," and "due process" are useful additions to his legal vocabulary, and his experiential frame of reference for such terms lies probably within the pages of his casebooks, not in the social reality to which he was previously accustomed. Thus, his communication to others of such concepts may be devoid of any sociological nexus in reality, possibly understandable to his fellow students and the profession, but probably totally meaningless in a real sense to his future client.

Once the law student has learned his new legal language, he may be unconsciously confined by it in his future activities. The notion that perceptions of the world on the part of any given group are controlled, to a great extent, by the language of the group is known as the "Sapir-Whorf Hypothesis." Professor Hertzler describes it as follows:

> As human begins live in the objective world and the world of social activity, they are "very much at the mercy of the particular language which has become the medium of expression for their society." . . . The "social patterns called words" affect even our simple acts of perception. "We see and hear and otherwise experience as we do because the language habits of our community predispose certain choices of interpretation."

The language community of the law student is, to a great extent, the law school. If his perception is confined and conditioned by the language of his casebooks and peers, the effect may be a perpetuation of his isolation from social reality. Perhaps this is one reason why the attorney just graduated from law school finds that the rules he learned in law school "don't work the way they were supposed to" in practice.

The challenge presented to legal education is obvious: to bridge the linguistic gap between the law student on the inside and society on the outside. Student practice programs in some law schools do much in this respect, but an exposure to the elements of language and communication theory as it relates to the social world is also necessary.

Given the general orientation to the relationship between language and society described in *A Sociology of Language,* together with an awareness of the problems involved when this concept is

applied to the relationship between language and law, the need for continuing research in the area of law and communication is obvious.

The awareness that much of the language of law is in the written form of cases, statutes and administrative rulings might mislead the researcher into a notion of finality in the law, which would make any search for predictability somewhat easier. The written form of language seems less amenable to change. Yet, the fact that every problem that confronts the court or the lawyer has its roots in a unique sociological frame of reference suggests that a routine rhetorical treatment of it is not entirely adequate in a communication sense. An empirical approach is called for in such situations.

It may very well be that an empirical approach to legal language is impossible or impractical in some cases. The rhetorical use of language may prove beneficial to maintain some sort of stability in the rules, which is necessary for a system of social control, and important for cohesiveness in the profession. Law and language, however, are inextricably bound to a social nexus, and the fact that law cannot be separated from human behavior calls for at least an awareness of the sociological referent of the language and the rule.

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Cases of particular importance to an article or note are italicized. All references are to the specific pages within the works where the cases are discussed.

ERRATA

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The name of the *Willamette Law Journal* is misspelled in note 97 at page 189.

The name *Adderley* in the case of *Adderley v. Florida* is misspelled throughout the *Note* beginning at page 300.

In the article *The "Torrey Canyon" Disaster: Some Legal Aspects,* the sections beginning on page 412, *Issue of Jurisdiction,* and on page 413, *Liability for Oil Pollution,* should be subordinated under the topic, TRENDS IN DECISION, beginning on page 406. The section beginning on page 419 should be designated IV. APPRAISAL AND RECOMMENDATION.